The Central Law Journal.

*ST. LOUIS, NOVEMBER 9, 1888.*

## CURRENT EVENTS.

CHAMPERTY—CONDITIONAL FEES—AGAIN.—Upon further consideration of the subject of "champerty and conditional fees," we would note that the Supreme Court of the United States has decided in numerous cases[1] that attorneys might lawfully contract with their clients to prosecute, before the proper authorities, auditors, boards, committees, commissioners, departments and the like, claims against the United States, and to receive in compensation therefor fees conditioned upon success or agreed percentages upon the amount recovered.

As we said in our former article,[2] "the common law rule on this subject has been variously interpreted by different courts and modified by legislation in many States. We do not, at present, propose to consider any question arising out of the existing state of the law on the subject, but confine ourselves to the question whether public policy requires that there should be any legal limitation upon 'free trade' in professional services."

We return to this subject now only to consider the question, when, and in what classes of cases contracts for professional services, to be paid for only upon condition of success or by a percentage upon the amount recovered, are compatible with public interests or consistent with public policy. These contracts are made for one or two reasons, or for both. One is that the claimant or plaintiff is too poor to pay, or promise absolutely to pay the regular fee for such services, the other is that the claimant has not enough faith in his claim to induce him to risk any money upon it. He will not "send good money after bad," nor expose himself to the peril of having to pay one dollar for the privilege of airing his grievance, but is perfectly willing, as it will cost him nothing, that the attorney or claim agent may play out the game for "all it is worth." In either case, as the hazard is shifted from the client to the attorney, the latter naturally protects himself by charging a larger fee or a heavier percentage than he would have exacted if his fee had been actually paid or secured, thus making successful cases pay for losses incurred by those in which the result is unfavorable. This, we think, he may, within reasonable limitations, very fairly do. "The laborer is worthy of his hire," and if his hire is contingent it is not unfair that it should be greater than if it were assured.

The question remains, against what classes of adversaries should the taking of contingent fees be permitted, either absolutely or under restrictions. So far as concerns claims upon the government, State or national, we do not see why there should be any restriction. In a large proportion of the cases the existence of the grievance is the fault of the government itself, being caused by the neglect or misfeasance of official persons. Besides this, in nearly every instance in which a claim can be made against a government its interests are protected by special statutory rules of evidence, safeguards of which a private defendant cannot avail himself against a private plaintiff. It may be added that private persons may be very seriously annoyed and injured by suits under the contingent fee system, and from such annoyance and oppression defendants may well claim protection. The government needs no such protection; no cause of action exists against it which it has not itself authorized, by statute or by the acts of its agents and officers, for whom it is responsible. No suit can be brought nor claim preferred except in the precise form which the government has prescribed, and every cause of action or claim must be supported by evidence strictly conforming to elaborate rules specially applicable to such cases, and framed for the express purpose of protecting the interests of the government, against all possible loss or injury growing out of the ingenuity of claimants or petitioners.

As the interests of the government have been so carefully and effectually guarded and protected by statute law, it is only reasonable and just that persons who hold claims against it may avail themselves of all the professional aid

[1] Wylie v. Cox, 15 How. 416; Wright v. Tebbitts, 91 U. S. 252; Stanton v. Embey, 93 U. S. 548, 556; Taylor v. Bemiss, 110 U. S. 42, 45; *In re* Paschal, 10 Wall. 483; McPherson v. Cox, 96 U. S. 404, 417; Central R. Co. v. Pettus, 113 U. S. 116.

[2] *Ante*, p. 37.

they can get upon the best terms upon which they can obtain it.

While it must be conceded that claims against the government may well be prosecuted under contracts for contingent fees, and that no evil consequences follow that practice, we think the rule does not apply to litigation in which a private person is the defendant. Such persons are often subjected to serious annoyance, and sometimes to actual loss by frivolous and malicious suits, brought upon speculation by unscrupulous attorneys who hope to force a compromise out of which they may at least get their fees. Sometimes such actions create clouds upon title to real estate, which can only be removed by a final judgment. Such suits, brought by irresponsible plaintiffs through irresponsible attorneys, constitute a real grievance for which the ordinary process of the law affords no remedy. The strict enforcement of the ancient rule will operate, to a certain extent, to prevent these evils to limit unnecessary litigation, and to relieve the profession from the reproach of being always ready to undertake, upon speculation, any sort of case out of which there is a chance of making money.

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NATIONAL BAR ASSOCIATION — AMERICAN BAR ASSOCIATION.—In our last number we published a list of the officers, president, secretary, treasurer and vice-presidents for the several States of the American Bar Association, elected in August last for 1888-1889. The local council of that association for Missouri consists of the following gentlemen: Henry Hitchcock; Shepard Barclay; E. C. Kehr.

We now publish a list[1] of the officers of the National Bar Association, elected in the same month for the same period at the first annual meeting held in Cleveland, Ohio.

[1] Post, p.468.

## NOTES OF RECENT DECISIONS.

FRAUDS—STATUTE OF—SALE OF GOODS—PART PAYMENT.—The Supreme Court of Indiana, in a recent case.[1] drew a very sharp distinction between cases that are, and those which are not within the statute of frauds. The facts of the case were that plaintiff sold to defendant, by oral agreement, a lot of corn at fifty cents a bushel, the corn to be shelled and sacked and delivered on the bank of the Wabash river, at a point agreed upon between the parties. It was further agreed and part of the contract, that defendant should furnish plaintiff with sacks in which said corn should be delivered. Defendant accordingly furnished to plaintiff a certain number of sacks, but refused absolutely to accept the corn when it was tendered. Thereupon plaintiff brought suit against defendant, claiming damages for the breach of his contract and setting forth in his complaint all the foregoing facts.

The case went, upon demurrer, to the supreme court, and in delivering his opinion, Judge Elliott emphasized the fact that the defendant was bound by the contract to deliver sacks to the plaintiff in which the corn should be contained, and that in point of fact he did so deliver sacks to the plaintiff, and that such delivery was in fact, and was intended to be part payment for the corn. In this respect, it was held that the case under consideration differed from that of Hudnut v. Weir,[2] in the very material respect from the case under consideration, that there was no averment that the property delivered was intended as a payment. The court concludes:

"It will not, of course, be sufficient to prove a part performance, for that will not be an 'earnest to bind the bargain,' since the plaintiff must prove payment, as payment, of part, at least, of the agreed price. But as the case is now presented to us there was, it is conceded by the demurrer, payment of part of the price agreed upon by the contracting parties. They agreed what should be taken in payment, and what was agreed upon was in part actually paid, What the parties agree shall constitute payment the law will adjudge to be payment. It is competent for parties to designate by their contract how, and in what, payment may be made. It is by no means true that payment can only be made in money; on the contrary, it may be made in property or in services. In short, whatever the parties agree shall constitute payment will be regarded by the courts as payment, pro-

[1] Weir v. Hudnut (S. C. Ind., Sept. 27, 1888), 18 N. E. Rep. 21.

[2] 100 Ind. 501.

vided the thing agreed upon is of some value.[3] It has been held in many cases that payment in articles of property will bind the bargain, and prevent the operation of the statute of frauds.[4] A text-writer thus states the rule: 'There seems, therefore, no reason to doubt that the part payment required by the statute of frauds as an act in addition to the parol contract need not be made in money, but that anything of value, which, by mutual agreement, is given by the buyer and accepted by the seller, on account or in part satisfaction of the price, will be equivalent to part payment.'[5] Another writer says: 'The statute evidently contemplates that the part payment shall be made at the time the contract is entered into, and shall be in money or something of value, which is accepted as its equivalent.'[6] The thing delivered in part payment must be of some value, but if of any value at all, it will be sufficient to bind the bargain. One of the old writers says that, 'if all or part of the money is paid in hand, or I give earnest money, albeit it is only a penny,' the contract is valid.[7] Part payment of the price is earnest money and binds the bargain.[8] The complainant brings the case within the principles declared by the authorities, for it shows that the value of the use of the sacks was $25, and that the purchase price to that extent was paid by the seller's furnishing the sacks for the use of the buyer. If the seller had agreed to furnish for the use of the buyer a corn-sheller, or some other machine, as part payment of the purchase price, it would be very clear that such a payment would bind the bargain; and there is no difference in principle between such a case and one like the present, for it can make no difference what thing of value is given in part payment. Of course, the thing must be given in part payment of the purchase money agreed upon, or it will be unavailing; but here, as we have said, the property furnished the buyer is conceded to have been in part payment of the agreed price of the corn."

[3] Kuhns v. Gates, 92 Ind. 66; Tilford v. Roberts, 8 Ind. 254.

[4] Sharp v. Carroll, 66 Wis. 62, 27 N. W. Rep. 832; Bach v. Owen, 5 Term R. 409; Phillips v. Mills, 55 Ga. 633; Hunter v. Wetsell, 84 N. Y. 549; Combs v. Bateman, 10 Barb. 576.

[5] 1 Benj. Sales, § 194.

[6] Wood, Frauds, § 294.

[7] 1 Shep. Touch, 224; Langford v. Tyler, 6 Mod. 162; Artcher v. Zeh, 5 Hill, 200; Wood, Frauds, § 293.

[8] Howe v. Hayward, 108 Mass. 54; Bissell v. Balcom, 39 N. Y. 281; 2 Bl. Comm. 447; Wood, Frauds, § 294.

## TELEGRAPH POLES AND WIRES.

*Right to Erect Poles and String or Lay Wires Considered Generally.* — Telegraph, telephone and electric light companies neither own the fee of the streets nor have an easement therein, or a license to put up poles or to dig trenches in them, except as such rights may be conferred by legislative or municipal permission: hence, in the absence of such permission, their poles or trenches are nuisances in the streets.[1] In one case the court below decided that the erection and maintenance of telephone poles and wires in a city street, the fee of which was in adjacent proprietors, was an infringement of the property rights of such proprietors, even though the proper public authorities had consented to such erection. This case probably means simply that such companies must pay damages for their use of or injury to private property. No opinion was written on appeal, one member of the court being ill, and the others being equally divided.[2]

Under a statute, providing that a telephone company must obtain a designation of the streets in which it will be allowed to place its poles before erecting them, and also obtain the written consent of the adjoining land owner, a telephone company erecting poles in a public road, against the protest of the adjoining land owner, will be compelled by mandatory injunction at the suit of such person to remove poles so erected and prohibited from erecting others, notwithstanding that such company had the consent of the public road board of the town to place the poles where it did.[3] This case is noteworthy because of the use of the mandatory injunction to remove the poles. When the bill was filed the defendants were proceeding with the erection of the poles, and before the order to show cause (which contained an *ad interim* stay) could be served they had finished setting them. There was no delay by plaintiff,

[1] New York, etc. Tel. Co. v. East Orange, 6 Cent. Rep. 547.

[2] Wells v. Erie Tel. & F. Co., 34 N. W. Rep. 337.

[3] Brown v. N. Y. & N. J. Tel. Co., 7 Atl. Rep. 851.

and the defendants' action "was in complete defiance of the complainant's rights." No excuse was shown by defendants, and "under such circumstances the court will not hesitate in a proper case to grant a mandatory injunction." * * * "If the delay necessary to make application for relief gives the trespasser an opportunity to complete his trespass, that should not deprive the injured party of his claim to relief. It cannot convert the lawless misdeeds of the wrong-doer into an equity in his favor.[4]"

*Right of Municipalities to Grant Permission to String or Lay Wires.*—Even permission of municipal authorities may not be sufficient to authorize the laying or stringing of wires, since the municipality may not itself have authority under its charter to grant such permission. In the case wherein this point was decided, the Citizens' Telephone Company petitioned the common council of Newark for the right to erect and to maintain its poles and wires on the various streets, avenues and alleys of the city, subject to the charter and ordinances of the city and under the supervision of the street commissioner. The company agreed in consideration of the grant to furnish a telephone with free toll to all connecting exchanges, to each of the public officers and departments of the city government free of charge to the city. This proposition the city council accepted upon condition that the consent of abutting property owners on the streets upon which poles should be erected should be obtained. It was held that the city had no authority to give a right thus to use the public streets. There was a provision in the city charter authorizing it to regulate the streets and to prevent and remove obstructions therefrom, but this was held not sufficient to warrant the city to give the right to put up telegraph poles. Another provision in the charter authorized the city to prevent or regulate the erection of any stoops, bay windows, area, sign or *any post or erection* or any projection or otherwise over or upon any street etc., but it was held the objects over which authority was designed to be given by this provision were only such as are appurtenant to the adjoining property, and used within the public street for its convenience. It was explicitly pointed out by the court that the public easement in highways is vested in the public, subject to divesture by nothing short of an exercise of the sovereign power. Neither non-user nor adverse user will defeat the public rights. The legislature representing the public may release the public right by vacating the highway; may modify the public use by granting a right to use the highway for a horse railroad; or may restrict the public use by granting a right to erect poles and other obstructions in the highway. What the legislature may thus do it may delegate authority to do, but the delegation of such power must plainly appear either by express grant or by necessary implication.[5]

It is so simple a matter to name the grantee and indicate the places where it may set poles or dig trenches wherein wires may be placed that ordinarily no question as to the meaning of a pole or trench license arises. Yet in one case[6] the question was raised whether under certain authority conferred by congress, the telegraph company had a right to put up temporary poles in the streets of Washington. The act relied upon to justify the erection of the poles was that of congress, dated July 24, 1866—"An act to aid in the "construction of telegraph lines, and to se-"cure to the government the use of the same "for postal, military, and other purposes." Providing, "that any telegraph company now organized or which may hereafter be organized under the laws of any State in this union, shall have the right, not the privilege, to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or postal in the United States." etc. It was held that this statute was not limited by a subsequent resolution of congress which gave a special privilege to certain lines of a telegraph company to use the highways, roads, streets and grounds of the District of Columbia, and that the highways of the district were "post roads" of the United States, within the meaning of the statute.

[4] Broome v. Tel. Co., 7 Atl. Rep. 851. See also Whitecar v. Michenor, 37 N. J. Eq. 6.

[5] Domestic L. & T. Co. v. Newark, 16 Am. & Eng. Corp. Cas. 295; Morris & Essex R. v. Newark, 2 Stockt. 363; Jersey City Gas Co. v. Dwight, 2 Stew. 242; Montgomery v. Trenton, 7 Vr. 79; Paterson, etc. H. R. v. Paterson, 9 C. E. Gr. 158; Glasby v. Norris, 3 C. E. Gr. 72.

[6] West. Union Tel. Co. v. Hewett, 16 Am. & Eng. Corp. Cas. 276.

In an English case, the European and American Electric Printing Telegraph Companys' Act (14 and 15 Vict. ch. 35, § 37) provided that the company could lay down and place their pipe, etc., under any public roads, streets and highways, and along or across such places for the purpose of the telegraph and break up the pavement or soil for that purpose; but that nothing in this provision contained should extend to any railroad or canal except that it shall be lawful for the company to carry their wires, pipes, etc., "directly, but not otherwise, across any railroad or canal." The Southeastern Railway Company, in pursuance of their act had carried their railway on a level across a part of the public highway, in the city of Canterbury, the public having the full use of the highway except when trains were passing. *Held*, that the highway was not a highway, within the meaning of the Telegraph Company's act, and that it was a trespass to dig and bore under the railway for the purpose of carrying the telegraph under the railway. The court thought "across" meant over not under the highway.[7]

*Condemnation of Telegraph Right of Way.*—A telegraph company having sufficient authority to build its lines may condemn a right of way for its poles, if it cannot purchase the same by agreement with the owners. This exercise of the right of eminent domain depends, of course, upon statutory authority and upon the fact that the telegraph is a public instrument of commerce, as has been decided.[8]

Right of way for a private telegraph could not be condemned, and the telegraph company seeking to condemn a right of way must have performed all conditions of the grant to it laid by the government and aver performance thereof in its petition to condemn, else it may be enjoined. Thus, a telegraph company in the exercise of eminent domain, instituted a proceeding to condemn and appropriate so much of a bridge as was necessary to support a line of telegraph proposed to be built, and for the construction, operation and maintenance of the same. The bridge was built over the Missouri river, pursuant to State and national legislation. It was held that the telegraph company, before it could condemn the right of way, must file with the postmaster-general a written acceptance of the restrictions and obligations imposed by the act of congress "to aid in the construction of telegraph lines," passed July 24, 1866.[9]

It may be difficult, too, to rectify a blunder made in the petition for condemnation after commissioners are appointed under it. For example, a telegraph company seeking to get a right of way over a bridge particularly described the plans according to which it proposed to put the wires on the bridge. Commissioners were appointed to appraise the damage of the construction according to the plan specified, and then an injunction was obtained by the bridge owner on the ground that the wires, if put up as intended, would obstruct navigation. In the answer to the petition for the injunction the telegraph company offered to substitute other plans that would not cause any obstruction to navigation, and asked to have the injunction dissolved, and that the commissioners be allowed to appraise the damages. This was refused on the ground that the commissioners were appointed to appraise damages according to the plan first specified, and could not proceed with reference to another plan. But it was left optional with the telegraph company to begin another condemnation suit.[10]

A telegraph company may condemn a portion of a railway right of way.[11]

This case expressly decides that lines for the transmission of telegraphic messages constitute a work of "public use" under the laws governing the right of eminent domain. The amount of land to be taken may be indicated by the statute, but in the absence of statutory designation of the amount, a reasonable quantity of the land may be taken. In Illinois, the statute does not designate the width of the strip of land that may be taken for telegraph purposes, but authorizes the companies to acquire such an amount as may be necessary.[12]

Under this statute, it was held that, where

[7] S. E. Ry. Co. v. E. & A. Tel. Co., 9 Exch. 363; 23 L. J. Exch. 113.

[8] Telegraph Co. v. Texas, 105 U. S. 460.

[9] Chicago, etc. B. Co. v. Pacific Mut. Tel. Co., 16 Am. & Eng. Corp. Cas. 271.

[10] Pacific Mut. Tel. Co. v. Chicago, etc. B. Co., 16 Am. & Eng. Corp. Cas. 268 (Kansas, 1887).

[11] New Orleans, etc. R. Co. v. South. & A. Tel. Co., 53 Ala. 211.

[12] Lockie v. Mut. Union Tel. Co., 103 Ill. 401.

only one line of poles is specified in the petition and the evidence does not show that half a rod in width is an unreasonable amount, the judgment condemning that quantity will be sustained and will be construed to authorize the erection of but one set of poles. Whether or not the placing of poles upon a public highway is the imposition thereon of a new servitude, distinct from ordinary street uses, to be compensated for is a question as to which there appears to be a conflict of authority. The Supreme Court of Massachusetts[13] decided that an additional servitude is not imposed by the appropriation of a public highway for the use of a line of telegraph by the putting up of poles and wires on the street. The court further held the statute authorizing the placing of the poles to be constitutional, even though it made no provision for compensating the owners of the fee in the highway. Two of the judges, however, dissented from this conclusion, and in Illinois, the whole supreme court decided quite contrary to the Massachusetts case. That court held that the use of a highway by erecting telegraph poles upon it is a new and additional burden upon the fee not contemplated at the time of assessing the damages when the street was condemned, nor had in view when the land owner dedicated the highway to the public for ordinary street purposes, and that for such additional burden the owner of the fee in the street was entitled to compensation. They held also that if entry be made without an agreement with the owners of the fee in the street, or condemnation under the statute, the owner could have his action, which, in the case decided, was trespass *quare clausum fregit*.[14]

After a municipality has designated the street or highway upon which a telegraph company may place poles, and the telegraph company has complied with the conditions upon which the designation was made and expended money in erecting poles and stringing wires upon the places designated, the municipality cannot revoke its designation.[15]

This decision relied upon the great Dartmouth College case and State v. Blake,[16] and the large number of other authorities, denying the right the State or its municipal agencies to impair contract (charter) rights. The Hudson case went a little further than these cases, holding that a right to alter or repeal the charter reserved to the legislature would not confer upon the municipality power to revoke permission to put up poles after it had been acted upon.[17]

The same point has been decided with reference to railway companies. The power of a common counsel to revoke its permission given by statutory authority to the location of a railroad in the streets of a city was expressly denied.[18] Even where poles have been placed in a street by municipal authority, and the time for which permission was given for them to remain has expired without the company removing them, the mayor of the city has no right summarily to cut them down.[19] It was also held in this case, that the mayor was a trespasser when he cut down the poles. But an injunction to restrain the city officers from interfering with the telegraph men who were putting up the poles again was refused, on the ground that the time for which permission to maintain the poles having expired, the injunction would, in effect, authorize the company to do what it had no lawful right to do. Of course, when a company gets the right to put up poles this carries the right to go to them and repair them whenever reasonably necessary. But the company has no right to use the strip condemned for any other than telegraph purposes. It has no right to cultivate it, or to take exclusive possession of it.[20]

The question whether a land owner, whose property is condemned for a telegraph right of way, is entitled to further compensation if additional poles and wires are put up, was negatively answered in an English case depending upon statutes peculiar to the English system of government telegraphs.[21]

*Are Telegraph Poles and Wires Nuisances in Fact?*—This may be an important question difficult to answer affirmatively. In one

[13] Pierce v. Drew, 136 Mass. 73.
[14] Board of Trade Tel. Co. v. Barnet, 107 Ill. 508.
[15] Hudson Tel. Co. v. Jersey City (N. J., 1887), 16 Am. & Eng. Corp. Cas. 289.
[16] 6 Vr. 208.
[17] Hudson Tel. Co. v. Jersey City, 16 Am. &. Eng. Corp. Cas. 290.
[18] Passenger R. Co. v. Baldwin, 37 Leg. Int. 424; Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. 358; Commonwealth v. Boston, 97 Mass. 555.
[19] Mut. Union Tel. Co. v. Chicago, 16 Fed. Rep. 309.
[20] Lockie v. Mut. Union Tel. Co., 103 Ill. 401.
[21] Regina v. Metropolitan Ry. Co., 50 L. T. (N. S.) 6.

case,[22] the poles and wires were alleged to be nuisances in front of certain stores for several reasons: 1. Because they impeded entrance to the stores. 2. Because they might be blown down. 3. Because they increased the danger of fire by lightning and the difficulties of extinguishing a fire in the building if started. All these "reasons" were declared unworthy of consideration by the court, which pointed out that the poles were placed at the distance of 150 feet apart along the line of the curbstone as near as might be on the dividing line of lots and never in front of the entrance of any house or store. "Now, * * * said Judge James, is it not too great an appeal to the credulity of any judicial tribunal to say that the erection of poles at intervals of 150 feet along the line of a street can make any substantial impediment to the entrance of any business place on such street. * * * And it cannot, in the nature of things, be that they do. A space of twelve inches, which is about the average width of the pole, or fifteen inches if you please, occupied at intervals of 150 feet, can be no practical impediment to the approach of any man's house along any street of the city." The other reasons were declared to be "prospective and imaginary difficulties" which the court would not consider. A similar view was taken in Missouri in a case, wherein it was apprehended that the vibration of the pole would crack a wall and let the water from a sewer into a cellar.[23]

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[22] West. Union Tel. Co. v. Hewett, 16 Am. & Eng. Corp. Cas. 287.

[23] Gay v. Mut. Union Tel. Co., 12 Mo. App. 491. See also Rhodes v. Dunbar, 57 Pa. St. 274; Mayor of Baltimore v. Radecke, 49 Md. 228.

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FIRE INSURANCE—CONDITION IN POLICY—WATCHMAN—WATER SUPPLY.

SIERRA, ETC. CO. V. HARTFORD, ETC. CO.

*Supreme Court of California, May 21, 1888.*

1. A condition in a policy requiring that a watchman be kept on certain premises so long as an insured mill thereon remains idle, is complied with if he continues in close proximity to the property insured, and confines himself to such location as will enable him to speedily discover the inception of a fire.

2. Placing a tank fed by a flume just below the ridge of a mill, satisfies a requirement that a supply of water shall be constantly kept on its roof.

FOOTE, C., delivered the opinion of the court:

This is an action to recover a loss upon a fire insurance policy. Judgment was given for the plaintiff, and from that and an order denying a new trial defendant appeals. It is contended by the appellant that the jury found contrary to the instructions of the court, and that the evidence before them went, without contradiction, to show that the plaintiff had violated at least two of the warranties by which it was bound by the terms of the policy, and that the verdict was, therefore, against the evidence. The obligations thus imposed are to this effect: That during all the time the mill, which was part of the insured premises, remained idle the plaintiff should employ a watchman to be in and upon the premises insured, day and night; that the plaintiff should keep a supply of water to be constantly on top of the mill and in readiness for immediate use whenever required. It is alleged in the answer "that no watchman was employed at or in charge of the premises at the time of said fire;" and that "no water whatever was on top of the said mill at the time of said fire." The evidence is to the effect that a watchman was employed, whose duty it was to be at the premises insured and to be a sentinel in looking after them at all times when the mill was idle, but when the fire took place he was in front of a blacksmith shop belonging to the mill property, but not insured, which was about sixty-five feet from the mill, and that he was engaged at that time in watching over the insured premises, and was upon higher ground than that on which the mill stood, where he could have a better opportunity of seeing the mill, the outside machinery, and the tramway, which were all insured, than if he had been in the mill. So far as any negligence of the watchman is concerned in fulfilling his duty, it is clear that he was diligent in watching, and the only doubt which can be said to rest upon the plaintiff's compliance with the warranty, is whether by its terms it was bound to see that the watchman which it employed, was either in the mill or immediately at it, or the tramway or some other part of the property actually insured, or whether the warranty only bound the corporation to employ a proper watchman to be at and upon the premises whenever the mill was idle. To us it seems at if the corporation was only bound to employ a proper watchman to be in and upon the premises when the mill was idle. And when the watchman of a proper kind was employed to perform this duty, the plaintiff could not be held responsible for his not being, at the time of the fire, actually in the mill, or beside it, or the tramway or other insured property. Although the blacksmith shop was not insured, it was, in point of fact, upon the premises to which the insured property belonged, and the watchman, posted where he was, was just as much in, upon, and in charge of the insured premises as if he had been in the mill. As we understand the issues raised by the pleadings, as to the warranties, the fact that the watchman was not in the

mill or at the tramway when the fire occurred, is not alleged to be a breach of the warranty, but this is claimed in the argument, and the fact that he was sixty-five feet from the mill, in front of a blacksmith shop in full view of the insured property, is urged as proof that he was not on the insured premises when they burned, and therefore the contract of warranty was violated. We do not see any element in the acts of the corporation or the watchman which show any violation of the warranty, either through failure to employ the watchman, as required, or in his or the corporation's negligence in the performance of his duty as a sentinel. In this case under the issues made by the pleadings, the inquiry addressed to the jury was, did or did not the plaintiff have a watchman employed upon the premises insured at the time of the fire? It is not apparently questioned now by the appellant but what the watchman was so employed by the plaintiff, but the contention appears to be that the warranty consisted in something else besides that which was claimed in the answer, viz., that the watchman, although employed to be in and upon the premises, was not there, and that therefore a breach of the warranty is asserted. To us this seems to be nothing more than an allegation of negligence upon the part of the watchman, and for this the plaintiff was not responsible under section 2629 of the Civil Code. The case of Mining Co. v. Insurance Co., 67 Cal. 28, 7 Pac. Rep. 4, is cited in support of the defendant's contention that the fact of the watchman not being in the mill, or at it, or the tramway, or, as is expressed by the learned counsel, "on the premises insured," was a breach of the warranty. But an examination of that case discloses the fact that there the issue upon which the case was tried was whether or not the watchman was in fact in and upon the premises; here the issue as made by the pleadings is, was he employed at or in charge of the premises at the time of the fire? In Wenzel v. Insurance Co., 67 Cal. 440, 7 Pac. Rep. 817, it was held upon the facts found that no one was in fact employed as a watchman of the premises, because the individual, whom it was claimed filled that position, worked in the day-time 2,100 feet from the insured premises, and at night slept 900 feet from them. Here it is clear that the watchman was employed to do what the policy required, and that at the time of the fire he was at the premises, being in front of the backsmith shop that belonged to and was substantially a part of the premises including the mill and tramway, which two last were insured, on duty as a sentinel, and in a more favorable situation to keep guard and watch over the premises insured than if he had been in the mill or on or near the tramway. We do not see, under the defendant's contention, how being in the mill would have satisfied the conditions of the policy any more than being a hundred feet off on the tramway, which was insured, or close up to the mill, where he would have been less likely to have seen the fire at its inception, than where he was, sixty-five feet off, in front of the blacksmith shop, and on higher ground than the mill itself. We think that upon this state of facts the warranty is shown to have been fully complied with.

As to the question made upon the matter of inadequate water supply kept on the top of the mill, it is evident that no place on the roof was prescribed under the contract as being the particular place where the supply was to be located, and no specific amount of water was mentioned as being necessary to be kept. Both these questions, therefore, were matters of fact to be ascertained by the jury upon the evidence before them; which has been done. The evidence was that a tank about two feet deep and three feet square was located on the roof, but below the apex thereof, that it was fed by a small flume carrying water, and the jury was justified in believing that the tank was sufficiently supplied with water. At any rate, upon the testimony before them, we are not disposed to say that their verdict upon the question submitted to them was manifestly wrong, and against all the evidence.

As to the instructions given and expected to, we must say that we had some difficulty in determining which of them precisely were excepted to, but finally after much labor and consideration, we were enabled to identify them, and taking them and all the others together, although some of them perhaps, were subject to the objections made, yet we think the law was fairly put before the jury, and they could not have been misled to the defendant's prejudice, and that was sufficient, and has been so held in numerous cases. People v. Tomlinson, 66 Cal. 344, 5 Pac. Rep. 509.

We perceive nothing in the record which shows a misrepresentation of the value of the property insured which should entitle the defendant to defeat the plaintiff's recovery. No prejudicial error appearing, we advise that the judgment and order be affirmed.

NOTE.—It is not necessary to cite authorities to show that the breach of a condition in a fire insurance policy avoids the same. But the question often arises as to whether the facts in a given case constitute a breach. Attention is called to a number of cases construing provisions requiring the employment of watchmen. Thus, one reading, "a watchman shall be employed," to be in and upon certain premises "day and night, during such time as the works insured remain idle," is not complied with, if such watchman sleeps during the night in a building located across the road from the insured premises, and about one hundred feet distance therefrom. It would not help the matter in the least, if the watchman kept a dog in the insured building during the night, although such dog had entire range of the same, and was accustomed to bark loudly when disturbed.[1] It has also been held, that where a policy contains the stipulation, "warranted, a family to live in said house throughout the year," such stipulation was an express warranty which must be literally complied with, and that the sleeping of two workmen in the house was not in compliance with the same.[2]

[1] Trojan Mining Co. v. Firemen's Ins. Co., 14 Ins. L. J. 567.

[2] Poor v. Humboldt Ins. Co., 125 Mass. 274.

Where there is a warranty that a "suitable watch" will be kept, it is not for the court, but for the jury to decide, what, under the circumstances, is a "suitable watch."[3] The stipulation that a watchman be "kept upon the premises," inserted in the body of a policy, immediately following a description of the property insured, is in the nature of a warranty and must be substantially complied with by the assured. But such stipulation does not require a constant watch; if a watchman is kept in the manner in which men of ordinary care and skill in similar departments keep a watchman, it is enough.[4] But it was held in a New York case that, where the policy bound assured to keep a night watch upon the premises during the life of the policy, the fact that the watchman, unknown to assured, had agreed, and did occasionally look after a yard opposite the one insured, did not avoid the same.[5] A warranty to keep a watchman at night "*on the premises insured*," is not released by the sheriff's taking possession on a levy; nor does the presence of the sheriff satisfy the warranty, he not undertaking the duty of watchman, but spending the night in the office two rods away from the building insured, though he twice entered and examined it during the night of the loss.[6]

It has been held in Illinois, in a case very similar to the principal case, that "where permission was granted for closing distillery property, which was insured, for repairs, on condition a watchman should be kept on the premises, it was of no consequence what particular part of the premises the watchman occupied, if he was about the premises in the discharge of his duty, even though occupying an office not insured, it was a substantial compliance with the contract.[7] And where a policy of insurance upon a building in process of construction contained the following statement in the application (which was made a part of said policy): "Water-tanks to be well supplied with water at all times;" it was *held* that this statement must be taken to be made with reference to the existing state of the building, and that it required a performance of the conditions or stipulations adapted to that state of things. The water-tanks were to be supplied with all reasonable diligence, having reference to the progress in the construction of the building insured, and that assured was not to be required to have them at all times well supplied, from the first moment the policy issued, as they would have been had it covered a finished building.[8]

"In all cases where a strict and literal compliance with the terms of a warranty is known to be impossible, it is presumed that a substantial compliance therewith was intended, and if there is a substantial compliance the warranty is met, as when the policy requires water to be kept in the building, the requirement need only to be substantially complied with. Thus, where the policy stipulated that the 'insured is to keep eight buckets filled with water on the first floor, where the machinery is run, and four in the basement by the reservoir, ready for use at all times,' it was held that this stipulation was to be construed reasonably, *and in view of natural or unavoidable causes*, such as freezing weather, *and that, while a literal compliance might not be possible, yet the assured must show that he kept the buckets at all times, as required by the policy, in a good and serviceable condition at the places designated, ready for instant use.* So a warranty in this respect is to be construed according to the intent and evident understanding of the parties, as applied to the condition of the risk, its uses and purposes."[9]

Where, in an application for insurance, the question was asked, "is there a watchman in the mill during the night?" The answer being, "there is a watchman at night." It was held in a suit brought against the company, the mill having burnt one Sunday morning in the absence of the watchman who left the night before, that the survey contained a clear and certain engagement by the assured, that they would keep a watchman in their mill through the hours of every night in the week, from the time of ceasing work in the evening to the usual hour of commencing in the morning, and that this engagement having been broken the policy was avoided.[10] It is true, that "there is an important distinction between a *representation* and a *warranty;* the former, which precedes the contract of insurance and is no part of it, need not be materially true; the latter is a part of the contract, and must be exactly and literally fulfilled, or else the contract is broken and inoperative."[11] But where the representations are contained in an application which is made a part of the contract, every part applicable to the subject-matter is, of course, to be regarded as obligatory on the assured, whether such application is to be held a warranty, as in the policy, or a representation material to the risk, to be substantially kept and performed; a writing intended to be a part of a contract, may be incorporated into it, by a proper reference, as well as an extended recital.[12] It is furthermore clear that, where there is no imperfection or ambiguity in the language of a contract for insurance, it will be considered as expressing the entire and exact meaning of the parties, and no evidence of extrinsic matters as usages will be received to vary the terms expressed.[13] And where the facts were as follows, the questions in the application read: "Is there a watchman in the mill during the night? Is the mill ever left alone?" The assured answered, "no regular watchman, but one or two hands sleep in the mill." The application stipulated that it should be a warranty and the basis of the policy; the policy stipulated that the application was a warranty and a part of the contract, and that "any false representation by the assured of the condition, situation and occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentations whatever, either in a written application or otherwise, should render the policy void," and furthermore, the answer was true when the application was made, but owing to the non-payment of premium, the policy was not delivered until more than three weeks afterwards, and three days before its delivery, the hands ceased to sleep in the mill, which remained vacant at night until

[3] Power v. City Fire Ins. Co., 8 Phil. Rep. 566; Percival v. Maine M. M. Ins. Co., 33 Me. 242. See also Parker v. Bridgeport Ins. Co., 10 Gray, 302.

[4] Cracker v. People's Mut. Fire Ins. Co., 8 Cush. 79.

[5] Hovey v. Am. Mut. Ins. Co., 2 Duer (N. Y.), 554.

[6] First Nat. Bank of Ballstonspa v. The Ins. Co. of North America, 5 Lansing, 203.

[7] The Andes Ins. Co. v. Shipman, 77 Ill. 189.

[8] Gloucester Mnfg. Co. v. Howard Fire Ins. Co., 5 Gray, 497.

[9] Wood on Fire Ins., 441-2 and cases cited.

[10] Glendale Mnfg. Co. v. Protection Ins. Co., 21 Conn. 19. And see Sheldon v. Hartford Fire Ins. Co., 22 *Id.* 235.

[11] The Glendale Woolen Co. v. The Protection Ins. Co., 21 Conn. 18.

[12] Sheldon v. The Hartford Fire Ins. Co., 22 Conn. 244.

[13] The Glendale Woolen Co. v. The Protection Ins. Co., 21 Conn. 18; Sheldon v. The Hartford Ins. Co., 22 *Id.* 235.

its destruction by fire a few weeks later. It was *held* that the application was a promissory and continuing warranty, and that the policy was avoided by its breach.[14] And where a policy of insurance was issued upon a factory which was only run during a part of the year, and the answers to the companies printed interrogatories in its application, stating the use of the building and the precautions against fire, were such as from their nature were appropriate only to the time during which the mill was run, and the agent who issued the policy was made fully aware of the facts, and himself filled up the application, and wrote down such portions of the applicant's statement as he considered important, it was *held* that the company, even if it had not expressly made itself responsible for the agent's accuracy, could not avoid liability for a loss incurred during the season when the factory was stopped, on the ground that the answers in the application were warranties, and that the same state of things should continue during the life of the policy.[15]

Where, in answer to a question in an application, "is a watch constantly kept in the building, if not state the arrangements respecting it?" it was written, "no watch is kept, but the mill is examined thirty minutes after work is over each day," it was *held* that this statement was one which, as a general practice, was bound to be observed, though an occasional omission, owing to accident or negligence of workmen, not sanctioned or permitted by assured, might not be a breach or non-compliance, and where answer was made, "that the factory was worked from five A. M. until half-past eight P. M., sometimes extra work will be done," it was *held* that the assured were bound to make such examination thirty minutes after the cessation of extra work as well.[16] And where the application made a warranty contained the following, "is there a watchman kept on the premises at night and at all other times when the works are not in operation as when the workmen are not present?" And the answer was "yes," the representation was held to be a continuing one, and that the withdrawal of the watchman several weeks prior to the fire constituted a breach of the warranty.[17]

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[14] Blumer & Bliss v. Phenix Ins. Co., 45 Wis. 622; S. C., 7 Cent. L. J. 216.

[15] May v. Buckey Mut. Ins. Co., 25 Wis. 291.

[16] Naughton v. Manufacturers' Mut. Ins. Co., 8 Met. 114.

[17] Whitland v. Phœnix Ins. Co., 28 Up. Can. C. P. 53. And see the following cases touching applications for insurance and conditions in policies: Naughton v. Mnfg. Mut. Ins. Co., 8 Met. 114; Gates v. Madison Co. Mut. Fire Ins. Co., 3 Barb. 72; Rutledge v. Burrell, 1 H. Bla. 254; Warsley v. Wood, 6 Term R. 710; Alston v. Mechanics' Mut. Ins. Co. of Troy, 4 Hill, 329; Barrett v. Saratoga Co. Mut. Fire Ins. Co., 5 *Id.* 188; French v. Chenango Co. Mut. Ins. Co., 7 *Id.* 122; O'Neil v. Ins. Co., 3 N. Y. 122; Smith v. Ins. Co., 32 *Id.* 399; Wood on Fire Ins., 336; First Nat. Bank v. Ins. Co., 50 N. Y. 45; Ripien v. Ins. Co., 30 *Id.* 136; Rohrbach v. Ins. Co., 62 *Id.* 47; Miles v. Ins. Co., 3 Gray, 580; Naughton v. Ins. Co., 8 Met. 114; Tibbitts v. Ins. Co., 1 Allen, 305; Miller v. Ins. Co., 31 Ga. 216; Wustum v. Ins. Co., 15 Wis. 138; Hinman v. Ins. Co., 36 *Id.* 159; Fuller v. Ins. Co., *Id.* 599; Sawyer v. Ins. Co., 37 *Id.* 503; May on Ins., § 158; Daniels v. Ins. Co., 12 Cush. 423 4; Campbell v. Ins. Co., 98 Mass. 381; Chaffee v. Ins. Co., 18 N. Y. 376; LeRoy v. Ins. Co., 30 *Id.* 90; Elliott v. Ins. Co., 13 Gray, 139; Catlin v. Ins. Co., 1 Sum. 434; Blood v. Ins. Co., 12 Cush. 474; Wilson v. Ins. Co., 4 R. I. 141; Gilliat v. Ins. Co., 8 *Id.* 282; Frisiin v. Ins. Co., 27 Pa. St. 225; U. S. Fire and M. Ins. Co. v. Kimberly, 34 Md. 224; Stant v. Ins. Co., 12 Iowa, 374; Ins. Co. v. Slaughter, 12 Wall. 404; Ins. Co. v. Wilkinson, 13 *Id* 222; Glib v. Ins. Co., 1 Dillon, 446-7; Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Owens v. Ins. Co., 56 N. Y. 565; Schmidt v. Ins. Co., 41 Ill. 295; Aurora Fire Ins. Co. v. Eddy, 55 *Id.* 213; Price v. Ins. Co., 17 Minn. 497; Conover v. Ins. Co., 3 Dillon, 221; Cozenove v. Ins. Co., 6 C. B. N. S. 437; City of Worcester v. Ins. Co., 9 Gray, 27; Glennings v. Chenango Mut. Ins. Co., 2 Denio, 75; Egan v. Mutual Ins. Co. of City and County of Albany, 5 *Id.* 326; Wood v. The Hartford Fire Ins. Co., 13 Conn. 533-45; Jefferson Ins. Co. v. Cotheal, 7 *Id.* 73; Farmers' Ins. and Loan Co. v. Snyder, 16 *Id.* 481; Pawson v. Watson, Cowper, 785; Harlaw v. Thomas, 15 Pick. 66; 7 Cent. L. J. 369; 17 *Id.* 231; 23 *Id.* 385.

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RAILROAD COMPANIES — STREET CROSSING— BRIDGES MANDAMUS—CONSOLIDATION OF ACTIONS— AMENDMENT —NEW PARTIES— RESTORATION OF STREETS — CHARTER — CONSTRUCTION — MUNICIPAL CORPORATION—EVIDENCE.

CITY OF MINNEAPOLIS V. MINNEAPOLIS & ST. L. RY. CO.

*Supreme Court of Minnesota, September 14, 1888.*

1. *Railroad Companies — Highway Crossings — Bridges — Mandamus — Consolidation of Action. — Mandamus* proceeding against the Minneapolis & St. Louis Railway Company to compel it to bridge its tracks where they cross city streets, and to construct approaches to such bridges at one end of the same. The Manitoba Railway tracks cross the same streets so near to those of the other company as to suggest the necessity, if either system of tracks should be bridged, that the bridges be made continuous over all the tracks of both companies. A like *mandamus* proceeding was pending against the Manitoba Company to compel it to construct those parts of the bridges over its tracks with approaches thereto. Both causes were required to be tried together. *Held*, not to be error.

2. *Same — Amendment of Alternative Writ— New Parties.*—It was not error to allow an amendment of the information and alternative writ, and to bring in the Manitoba Company as a party in the proceeding against the St. Louis Company, the former company claiming some interest in one of the tracks of the latter, to which the proceeding relates.

3. *Same—Mandate— Manner of Restoring Street.*— The manner in which the duty of restoring the streets should be performed being uncertain, the mandate of the court may properly be specific in that regard.

4. *Same — Crossing by Other Company at Same Place.* — The fact that it is necessary, for the accomplishment of the purposes in view, that the Manitoba Company shall also bridge its tracks, is not a fatal objection to this *mandamus* proceeding against the St. Louis Company, the former company having been in fact required to construct the bridges over its tracks. *State v. Railway Co.*, 35 Minn. 131, 28 N. W. Rep. 3, and same parties, 36 N. W. Rep. 870, followed upon several points there decided.

5. *Same—Duty to Restore Street — Charter—Construction.*—Charter of the Minnesota Western Railway Company (Sp. Laws 1853, ch. 66) construed as imposing a continuous duty as to restoring public streets to usefulness, by bridging or otherwise, when necessary.

6. *Same—Railroad Constructed on Grade.*—The fact that a railroad has once been lawfully constructed upon the grade of a street does not exempt it from bridging when that becomes necessary.

7. *Same—Statute— Construction.* — Special act of 1879 (chapter 185), authorizing the St. Louis Company to construct branch lines and tracks, and requiring the city to build the approaches to necessary street bridges, constructed as not applicable to the already existing line of road.

8. *Same.*—Statutes of 1887 (chapter 15), relating to highway crossings by railroads, construed as intended to provide how grade crossings should be constructed, but not as authorizing all crossings to be at grade.

9. *Same — Restoring Street Before Establishment of Grade—Mandamus—When Lies.— Mandamus* proceedings may be prosecuted to determine the mode in which the respondent shall be required to restore a street, and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the level which the relator claims should be adopted.

10. *Same—Municipal Corporation — Resolution of Council.* — Upon a report to a municipal council by one of its committees, recommending certain action to be taken by the council, a record of the proceedings of the council in the word "adopted" expresses the will of the body that the course recommended be pursued.

11. *Same — Costs of Restoration of Street — Apportionment.*—Each company was properly required to construct those parts of the bridges above their own systems of tracks respectively, and approaches upon their respective sides, without other apportionment between them of the cost of the entire bridge structures and approaches.

12. *Same—Necessity of Bridge—Evidence.*—In view of the necessity that bridges be built over both systems of tracks, if over either, evidence was admissible in proceedings against one company as to the extent of the use of the street crossing by the other company, showing the necessity for a bridge at the place in question.

13. *Same—Alteration of Road Recently Constructed.* —The power of a court (if it exists) to require a considerable and important lateral change in the location of railroad tracks, (which had been long before lawfully laid across a public street), in order to restore the street to a proper condition of usefulness, should not be exercised unless that is reasonably necessary.

DICKINSON, J., delivered the opinion of the court:

For the sake of brevity we will, in this opinion, designate these two railroad corporations as the St. Louis Company and the Manitoba Company, respectively. This *mandamus* proceeding was originally commenced against the St. Louis Company to compel that corporation to construct bridges upon Washington avenue, Third, Fourth, and Fifth streets north, in the city of Minneapolis, above its railroad tracks, which, running easterly and westerly, now cross those streets upon the same level as the streets themselves. The work proposed also included the construction of approaches to the southerly ends of these bridges, upon these streets, above their present grade, and beyond the lands which the corporation has acquired for its purposes. It was also contemplated that the railroad track should be lowered, so as to allow the bridges to be constructed with a less elevation above the grade of the streets than would otherwise be necessary. The tracks of the Manitoba lie next northerly from and parallel with those of the St. Louis Company, and cross these streets in the same direction. The two systems of tracks are, however, separated, a hundred feet or more, by lands which the Manitoba Company has acquired for its purposes. When this cause came on for trial, a similar proceeding had been commenced against the Manitoba Company to compel that corporation to construct bridges over its tracks and its intervening lands, with approaches at their northerly ends. These separate proceeding against the two corporations contemplated that the work thus charged upon them separately should, when performed, constitute entire and complete bridges over both systems of tracks, with proper street approaches. The proceeding against the Manitoba Company, after judgment against it in the district court, was brought to this court by appeal. Our decision upon that appeal, affirming that of the district court, is reported in 36 N. W. Rep. 870. During the trial of this proceeding against the St. Louis Company, it appearing that the Manitoba Company claimed some interest in one of these St. Louis tracks, and the only one of its tracks which crosses Washington avenue, it was ordered by the court, upon the motion of the relator, and with the consent of the Manitoba Company, that the relator's information and the alternative writ be amended so as to make the Manitoba Company a party respondent. The St. Louis Company objected. After the trial of the cause, the court having adjudged that a peremptory writ of *mandamus* should issue against the St. Louis Company, requiring the prosecution of the work in question, in general accordance with the plan of the relator, set forth in its information, but with some particular modifications, both of the respondent corporations appealed.

The appeal of the St. Louis Company will be first considered. Without referring specifically to the eighty-three assignments of error made by this appellant, many of which present questions which were involved in and determined by the decision in State v. Railway Co., 32 Minn. 131, 28 N. W. Rep. 3, and in the case of the same parties, 36 N. W. Rep. 870, we propose to direct attention to such of the subjects referred to in these assignments as seem to us to require particular mention in this opinion. The allowance of the amendment bringing in the Manitoba Company as a party respondent was not error. The statute authorizes this practice. Gen. St. 1878, ch. 80, § 9; *Id.* ch. 66, § 43. It was proper in this case, in order that that company might be concluded in respect to the proposed changes in the track to which it had or asserted some right. At the time of the trial

of this proceeding against the St. Louis Company, the like proceeding against the Manitoba Company, above referred to, being then pending, and ready for trial, the court ordered both cases to be tried together, the St. Louis Company objecting. In this we see no abuse of the discretion of the court, in view of the peculiar nature of these causes, the similarity, and to a large extent the identity, of the questions to be considered, and of the evidence bearing upon them, and of the fact that in determining either case regard should be had to the determination in the other; for obviously neither respondent should be required to construct sections of bridges over its tracks, unless the sections over the tracks of the other company should also be constucted. There was no consolidation of the cases, but the evidence in both was received at the same time. A great deal of testimony, covering several hundred printed pages, had already been taken in the St. Louis case before a referee, which the Manitoba Company appears to have allowed to be read as evidence in its case. We think that the circumstances would have justified a joint proceeding against both companies. It admits of no question that, in general, *mandamus* may be resorted to as a means of compelling the performance of a duty such as is claimed by the relator to rest upon this railroad company; and it has been resorted to in this State in cases like that now under consideration. State v. Railway Co., 35 Minn. 131, 28 N. W. Rep. 3; same parties, 36 N. W. Rep. 870. It is urged by this appellant, as an objection to the writ in this case, that it prescribes particularly the manner in which the alleged duty shall be performed, instead of allowing the respondent to adopt its own plan for restoring the usefulness and safety of these streets. Where, as in this case, it has been in no manner determined, either by the law, by the circumstances of the case, or otherwise, how the alleged duty should be performed, the course suggested by this contention of the respondent would be subject to most obvious objections. It may be assumed that where it is necessary to resort to compulsory process of the courts in such cases, it is because there is a disagreement between the public authorities and the respondent as to the duty of the latter to do anything, or as to what its duty requires it to do. Neither of the parties thus opposed in interest can determine these matters of difference. It is for the courts to decide. State v. Railway Co., 35 Minn. 131, 28 N. W. Rep. 3. It is expedient that the thing to be done be effectually determined before a peremptory writ be issued, and that the party upon which the duty may be found to rest be required to do that specific thing, which, when done, must be accepted as the performance of its duty. If the writ were to command generally the performance of the duty of restoring the street to a condition of safety and usefulness for public travel, the respondent being left to select its own plan and means of accomplishing this result, it might be found, after much time and money had been consumed in carrying out the plan adopted by the respondent, that it was not such as to accomplish the public purposes in view. The court might so decide and command the work to be undertaken anew. In People v. Railroad Co., 58 N. Y. 152, the writ was made specific, the respondent claiming to have already performed its duty in the premises. The same reasons which suggest the propriety for making a writ specific in such a case are equally applicable in any case where the nature of the thing to be done is uncertain, and can only be determined by the judgment of the court. It was the more clearly necessary in this case that the plan for restoring these streets be judicially determined, and the writ made specific, from the fact that the purposes of the proceeding could only be accomplished by the adoption of one plan for both of these respondents, so that the work of each should be the complement of that of the other, the whole forming complete bridges adapted to the necessities of the public. Under our statute (Gen. St. 1878, ch. 80, § 9), allowing amendments of the writ and answer as in respect to pleadings in civil actions, and prescribing that the issues be tried and further proceedings had in the same manner as in civil actions, this proceeding is sufficiently elastic to enable the court to determine upon trial the plan which ought to be adopted to accomplish the ends in view. It is said that the accomplishment of the purposes contemplated by this proceeding is contingent upon the Manitoba Company being required to bridge its tracks in accordance with the same plan. This suggests the expediency of one proceeding against both companies; but, as the case stands, and as the Manitoba Company has been required to so proceed, that contingency is not deemed to be a reason for setting aside the determination in this case.

We deem the decisions of this court, above cited, to be decisive of several important points urged by the appellant, such as the duty to construct necessary bridges; the continuous nature of the respondent's duty in respect to the restoration of the streets; the right to compel the sinking of its tracks for this purpose, and without compensation; the construction of street approaches extending along the streets in front of property owned by other persons; and the objection based upon the necessity for acquiring other lands, for the purpose of necessary retaining walls—unless the result should be affected by the charter of this company, or other statutory provisions, or of other circumstances, to which we are about to refer. It is claimed, in view of the provisions of the act incorporating the Minnesota Western Railroad Company (chapter 66, Sp. Laws 1853, § 8), to which this respondent traces its corporate authority, that the continuous obligation which has been decided to rest upon the Manitoba Company, in respect to restoring the usefulness of public streets, by bridging or otherwise, is not chargeable upon this respondent. The difference in the corporate laws of the two companies do

not justify this position. The language and reasoning of the court in the decision referred to (35 Minn. 131, 28 N. W. Rep. 3) are as applicable to the provisions of this charter as to that which was construed in the above decision. The same right to construct the railroad across public highways is given in both charters. In the Manitoba charter the further duty is expressed, to "put such highway * * * in such condition and state of repair as not to impair or interfere with its free and proper use." The corresponding provision in the St. Louis charter is to "restore such road, highway, * * * to its former state, or in a sufficient manner not to impair its usefulness to the owner or to the public." Again, it is claimed that by force of chapter 185, Sp. Laws 1879, this company is relieved from the duty of constructing the approaches to such bridges, that burden being expressly imposed upon the city. This is entitled 'An act to authorize and empower the Minneapolis & St. Louis Ry. Co., to construct and operate a branch line of railroad from the city of Minneapolis to some point on the south shore of Lake Minnetonka, and construct and operate branch lines and spur tracks in the city of Minneapolis." Section 1 authorizes that corporation to construct "a branch line of railroad from some point on its present line in the city of Minneapolis," using any part of its already existing line for that purpose to Lake Minnetonka. Section 2 authorizes the location and construction within the city of any "extensions and branches that may be necessary to connect said road, or its present road, with any and all railroads; * * * and may also build, maintain, and operate extensions, branches, and spur tracks from any of its lines now or hereafter built to any mills or manufactories or other industries requiring railway facilities, * * * with all necessary side tracks, turn-outs, and connections." Section 4 contains the proviso: "That the grades of the tracks of said railroad, where the same shall cross any public street in the said city of Minneapolis, shall be such as shall be designated and fixed by resolution of the common council; * * * and in case any such crossing shall involve the necessity of a bridge, to allow of any street passing under or over any such railroad, then such company shall pay the expense of the construction and maintenance of the abutments, excavations, and superstructures of such bridge, and the city shall pay the expense of the construction and maintenance of the street approaches to said bridge." The branch line, constructed under this authority, may be designated as the "Pacific Division" of this road. This diverged from the main line (which had been constructed long prior to 1879), at Hopkins, a place some distance westerly from the premises in question, and ran westerly from that place. From Hopkins to Minneapolis the trains this Pacific division run over the main line. Some of the side tracks, crossing Fourth and Fifth streets, were put in after the passage of the act of 1879. All of these tracks—the main line track and the terminal side tracks—are also used for the business of the Pacific division. The court found that none of the tracks in question were constructed as any part of the Pacific division, and had no special relation thereto more than to its main line. The court also considered the above proviso to be unconstitutional, so far as it related to the expressed obligation of the city. It is not necessary for us to pass upon the constitutionality of the law. The fact as found by the court is justified by the case, and we are of the opinion that the proviso has no applicability to the tracks in question, so as to relieve the respondent from the duty resting upon it prior to the passage of that act. The act does not disclose a purpose to change the rule of law in this respect as to the then existing railroad; and as the proviso under consideration, in its most natural construction, in applicable merely to the line or tracks to be constructed under the authority of that act, it must be considered that as to the main line of road, and its proper side and terminal tracks then existing or thereafter constructed under its original charter, the duty of the company was unchanged by this act of 1879. The fact that the newly authorized line used these tracks for its business would not bring them within the operation of the proviso. Chapter 15, Gen. Laws 1887, is appealed to as authorizing the respondent to maintain its crossings upon the present grade of these streets. This act cannot be construed as intended to make that radical change in the law contended for by the respondent. We think it was intended only to apply to cases where grade crossings were proper, and not to declare that all crossings might be at grade. In such cases as are contemplated by the act it prescribes how the crossing shall be made. The terms of the law do not justify the conclusion that the legislature intended to require, or to allow, all railroad crossings to be upon the grade of the streets, in the most frequented portions of our large cities where there are many tracks in constant use, as well as at ordinary country highway crossings. The fact that the respondent formerly laid its tracks, at a considerable expense, upon the grade of the streets, by the authority of the city council, does not exempt it from the duty of bridging when the increased use of both the railway and of the streets renders that necessary. State v. Railway Co., 35 Minn. 131, 28 N. W. Rep. 3. From the fact that the city has not yet changed the grade of these streets so as to conform to the plan of the proposed bridges it does not follow that this compulsory proceeding may not be maintained. The city authority had no power to compel these corporations to adopt the plan which they might deem best; and since, as has been decided, it could only be finally determined by judicial decision what the corporations should be compelled to do, it is obvious that any fixing of grade for these bridges, by the action of the city council, prior to the decision of the controversy as to whether the corporations were under obligation to bridge the streets, and, if so,

how it should be done, would have been speculative, and subject to such changes as might become necessary as the result of the decision of the court. The authority of the court to determine the necessity, and the mode of carrying these streets over the tracks, necessarily involves the power to determine the elevation or grade of the bridges; and to this extent the power given by the city charter to the city council to establish and changes the grade of streets must be regarded as qualified. The evidence shows, as we consider, that the city council did adopt the plans and grade shown in the information. These plans having been reported to the city council by a committee of that body, with the recommendation that the same be adopted by the council, and that the city attorney be instructed to commence proceedings in court for their enforcement, the action of the council thereupon is expressed in its records by the word "adopted." This expresses the adoption by the council as its will of what was thus recommended. Whether this was necessary, we do not decide.

Some assignments of error are based upon the fact that this appellant is charged with the duty of constructing these parts of the bridges extending over its own tracks, and the approaches on the south side, without proof that the cost of doing this is a fair, ratable proportion of the cost of the entire work charged upon both companies, and without due regard to the proportionate use made of these street crossings by the two companies respectively. We do not think that the case is such as to have required or justified such an apportionment of the burden as is suggested by the appellant. Although the duty of these companies, respectively, to bridge over their tracks, arises from the use of the street crossings, the extent of the burden in this respect to be borne by each company is not legally measured by the extent of that use. The necessity being shown, the duty rests as absolutely upon the St. Louis Company to bridge its own track at Washington avenue as it does upon the Manitoba Company in respect to its four or more tracks across that street, even though the use of the latter is four or ten times greater than that of the former. That duty being absolute, and resting upon that company independently of the duty upon the other corporation, it may be required to perform it. And so as to the approaches, the duty is of the same absolute nature. Ordinarily, where a railroad company is required to bridge its tracks, it may also be required to make proper approaches at both ends of the bridge. Here the bridges of each of these companies over their respective systems of tracks form approaches upon one side to the bridges of the other company, so that upon each street only one graded approach is required leading up to the bridge structure which each company is required to construct. In view of the independent nature of the obligation of each company to bridge its own track, we think that each company was properly required to construct the approach to its own bridge as a proper part of it own peculiar work. We have spoken of the duties of these companies as being independent, and not joint. This is not to be confounded with the plan or manner of performance, which, as respects both companies, should, for obvious reasons, be in some sense and to some extent common, or at least similar. In this connection we refer to the point that evidence was received, against the objections of this appellant, not only of the extent of the use of these crossings by the trains of that company, but also by those of the Manitoba Company. This was properly received as bearing upon the question whether a bridging of these tracks had become necessary for the purposes of the public in the use of these streets. The circumstances were such as to justify the conclusion that, whenever a bridge across either system of tracks should become necessary, it would be necessary, that it extend over both systems. As bearing upon the needs of the public for bridges upon these streets the evidence was admissible, although what the Manitoba Company might do in the use of its tracks was in no respect to be attributed to the St. Louis Company as its act. It was admissible, for the same reason, that proof might have been made, as was in fact done, of the extent of travel upon the streets. State v. Railway Co., 35 Minn. 131, 28 N. W. Rep. 3. As to the two south spur tracks of the St. Louis Company, leading to certain private warehouses, we see no error in the action of the court. It is left to the option of the company to sink them so as not to interfere with the bridges, or to remove them. That company cannot complain because the court gave it this option, and did not dictate which should be done, or decide whether it was practicable to pursue the former of these alternatives. There are other questions presented involving the sufficiency of the evidence to sustain the findings of the court, and the propriety of the action and determination of the court in matters requiring the exercise of its judgment and discretion, which we will not specifically refer to. We see no substantial error in respect to anything material to this cause. Several of the assigned errors in respect to matters relating to the proposition requiring the removal, laterally, of the St. Louis track, it is unnecessary to examine, since the determination in respect to this subject is in favor of this appellant.

Upon the appeal taken by the Manitoba Company, the only point requiring separate and particular mention is that relating to the removal of the St. Louis main track, as proposed by the Manitoba Company, and the use by the St. Louis Company, in lieu of that track, of the tracks of the Manitoba Company, more than a hundred feet north of that main track, and away from the side tracks and station grounds of the St. Louis Company. The original findings and opinion of the court below upon this point are shown in State v. Railway Co., 36 N. W. Rep. 870. Afterwards the court further found in this case that the proposed plan for a removal of the St. Louis track was sat-

isfactory to the relator; that it was a reasonable plan, and better for each respondent, as well as for the public, than any other plan proposed to the court. And the court further stated that it would have requested this change to be made were it not for the considerations expressed in this language: "But as we find that the streets can be restored to reasonably good condition for public travel, in accordance with relator's plan as modified, without disturbing the location of said main track of the St. Louis Company, it is our opinion that this court has no power to require that company to change the location of its main track so as to conform to that plan." The case now presented is not essentially different in this respect from that presented upon the former appeal of the Manitoba Company, the decision in which is above referred to. It is not necessary now, as it was not then, to decide whether under any, or under what, circumstances a railroad company can be compelled to thus relinquish its right of way and go elsewhere. It is enough to say, as was said in substance in the decision last cited, and as the court below seems to have considered, that such a power (if it exists), must depend upon such a course being reasonably necessary to restore or preserve the proper usefulness of the street. This is a condition which the findings expressly exclude from this case. The idea expressed by the court below is that because there was no necessity for requiring such a relinquishment, the court had no power to do it. It is at least true that in such a case it ought not to do it, and in view of the decisive facts that this was not necessary in this case, and that that the plan determined upon satisfies the requirements of the public, and is acceptable to the relator, representing the public interests, the decision was right. We do not think that the interest which the Manitoba Company may have in this track affects the result in this particular. It is said that there is a clerical error in the mandate respecting the grade at a certain point. We do not understand that the record before us is such as to enable us to correct that error, and application for that purpose may properly be addressed to the court below. Judgment affirmed.

## WEEKLY DIGEST

**Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.**



1. ABDUCTION—Purpose—Prostitution.—— Where an Indian prisoner escapes from the reservation taking with him an Indian girl of 11 years and forcibly has sexual intercourse with her, he is not guilty of abduction, under Alabama laws, providing for punishing abduction of a girl under 14 years of age for purposes of concubinage, etc. — *United States v. Les Cloye*, U. S. D. C. (Ala.), July 11, 1888; 35 Fed. Rep. 493.

2. ACCORD AND SATISFACTION — Vendor and Vendee. ——Circumstances stated under which it was held that the evidence showed a complete accord and satisfaction of a claim made for deficiency of lumber delivered by a vendor to the vendee.— *Woodford v. Marshall*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 376.

3. ADMIRALTY—Jurisdiction— North River Pier.——A pier extending into the north river from the city of New York is not within the jurisdiction of the district court of the United States for the eastern district of New York.—*Euberweg, La Campagnie T. Co.*, U. S. D. C. (N. Y.), May 23, 1888; 35 Fed. Rep. 428.

4. ADVERSE POSSESSION—Trespass— Waste. —— One who has held adverse possession for fifteen years within defined boundaries of a tract of land may maintain an action of trespass against one who commits waste on that land, although he may have no paper title to the land.—*Farmer v. Lyons*, Ky. Ct. App., Sept. 22, 1888; 9 S. W. Rep. 248.

5. APPEAL—Abstract— Waiver. —— Where the stipulation makes no reference to the abstract, and does not in terms waive defects therein, the omission of the abstract to state that an appeal has been taken is not waived, and the court will not go back of the abstract and ascertain from the transcript whether in fact an appeal has been taken. — *Talbort v. Noble*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 250.

6. APPEAL — Bill of Exceptions — Settlement. —— A petition to settle a bill of exceptions, averring that the bill does not state sufficient of the testimony to explain the questions to which exceptions were taken, must set forth the statements of the bill which are alleged to be contrary to the facts, together with the facts and the point of exception. — *In re Biddle's Estate*, S. C. Cal., March 8, 1888; 19 Pac. Rep. 181.

7. APPEAL—Bond—Motion to Dismiss.—— Failure to file a sufficient bond before the hearing of a motion to dismiss the appeal for lack of such bond, indorsed with the approval of one of the justices, renders the appeal ineffectual, under California law.—*Wood v. Pendola*, S. C. Cal., Sept. 20, 1888; 19 Pac. Rep. 183.

8. APPEAL—Errors Abandoned. —— Errors assigned but not noticed in argument will be considered abandoned.—*Duncomber v. Powers*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 261.

9. APPEAL—Notice— Mistake. —— A notice of appeal was by mistake entitled and filed in a case with which the appellant was not connected: *Held*, that there was an entire absence of notice, which could not be sup-

plied. — *Larson v. Utah & W. R. R.*, S. C. Utah, Aug. 27, 1888; 19 Pac. Rep. 196.

10. APPEAL— Orders — Producing Papers. —— In an action against a common carrier to recover overcharges, an order to produce its books, showing its dealings with other shippers, is not appealable, under Iowa law.— *Cook v. Chicago, etc. R. R.*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 253.

11. APPEAL—Review — New Trial. —— The appellate court will not disturb the ruling of the trial in the absence of a clear showing of the abuse of the court's discretion.—*Minturn v. Bliss*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 185.

12. APPEAL — Witness — Ruling out Answer. —— An exception to the refusal of the court to require a witness to answer a question will not be considered on appeal, when the record does not show what the answer would have been.—*Lockhart v. Keller*, S. C. Tex., June 19, 1888; 9 S. W. Rep. 179.

13. APPEAL— Writ of Error—Quashing Fi. Fa.—Without being excepted to, a judgment quashing a mortgage *fi. fa.* at the instance of the claimant, though erroneous, cannot be reversed on writ of error.—*Davidson v. Rogers*, S. C. Ga., Nov. 10, 1887; 7 S. E. Rep. 264.

14. ARREST—Privilege—Custom Officer. ——A custom officer of the United States is not exempt from arrest under civil process from a State court, under the act of congress forbidding interference with custom officers, such arrest not being made with that intent.—*Ex parte Murray*, U. S. D. C. (Ala.), July 12, 1888; 35 Fed. Rep. 496.

15. ASSIGNMENT—Trust—Creation.— An oral promise by a debtor to pay certain creditors out of the proceeds of a note due the debtor, no writing to such effect being made, and the note not being delivered to any for such purpose, does not transform the note into a trust fund for the benefit of such creditors. — *Marshall v. Strange*, Ky. Ct. App., Sept. 22, 1888; 9. S. W. Rep. 250.

16. ASSIGNMENT FOR CREDITORS— Preferences by Contract. —— The delivery of lumber by an insolvent vendor, shortly before an assignment for benefit of creditors, under contract on which the vendees had as required advanced the entire purchase money to enable him to comply with the contract, is not a preference, under the Kentucky insolvent act of 1856.—*Vincent v Alpin*, Ky. Ct. App., Sept. 13, 1888; 9 S. W. Rep. 165.

17. ATTACHMENT—Bond.—— It appearing on the face of the record that no bond was given, until after the judge issued the attachment, the attachment is invalid. — *Enneking v. Clay*, S. C. Ga., March 5, 1888; 7 S. E. Rep. 257.

18. ATTACHMENT—Bond.——An attachment against a fraudulent debtor cannot issue till bond is given as provided by law. — *Clay v. Tapp L. Co.*, S. C. Ga., March 3, 1888; 7 S. E. Rep. 256.

19. BAIL—Money — Forfeiture. —— Under Iowa law, where money has been deposited in lieu of bail, the entry of defendant's default does not transfer the money to the school fund, and when the default has been set aside, though at a subsequent term, the forfeiture may be discharged and the money returned. —*Arquette v. Board of Supervisors*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 264.

20. BANKS—President- Ratification—Acquiescence.— An acquiescence for a period of seven years in an unapproved release of a debtor of a bank by its president: *Held*, to be a ratification of such release.— *Bellerille Sav. Bank v. Winslow*, U. S. C. C. (Mo.), June 13, 1888; 35 Fed. Rep. 471.

21. BONDS—Officer—Liability of Surety. ——A federal officer gave bond for the faithful disbursing of certain appropriations. He also received moneys for passport fees, which were transactions independent of his bond. He drew a draft on the appropriation fund to recover a deficit in the passport fund: *Held*, in an action against his sureties they had a right to a readjustment; the draft was void as against them.—*United States v. Morgan*, U. S. C. C. (N. Y.), June 26, 1888; 35 Fed. Rep. 489.

22. BOUNDARIES—Processioning.—— It is a misapplication of the laws on processioning to use them to ascertain the boundaries between town lots and an adjacent tract, which were intended for the boundaries of rural lands only. —*Christian v. Weaver*, S. C. Ga., Nov. 29, 1887; 7 S. E. Rep. 261.

23. CHATTEL MORTGAGE — Bond— Amendment. —— Under Georgia code, a bond given on filing an affidavit of illegality by the defendant in a mortgage *fi. fa.* issued to subject personal property, is amendable when the penalty is too small and the condition variant from that prescribed by the statute.— *Lytle v. De Vaughn*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 281.

24. COLLISION—Vessel at Anchor— Usual Course.—— A vessel, lying at anchor in the Hudson river at a usual anchorage ground, during a violent gale was run into by a steamer: *Held*, that the vessel was in fault for not having an anchor light burning, and the steamer for running out of the usual track near an anchorage ground.— *The Drew*, U. S. D. C. (N. Y.), June 11, 1888; 35 Fed. Rep. 789.

25. CONTRACT—Burden of Proof—Bond. ——Where in an action on a bond of sureties of a building contract the answer is a general denial, it is incumbent upon plaintiff to show that the material furnished to them to complete the building were within the terms of the contract—*Plummer v. Shellhorn*, S. C. Neb., Sept. 25, 1888; 39 N. W. Rep. 430.

26. CONTRACT—Condition—Precedent.——Where in a lease for a patented machine it is provided that certain quantities of pulp to be designated by a third person shall be delivered to the lessee at the time of delivery should be appointed by that person: *Held*, that the designation and delivery of the pulp were not conditions precedent to the leasee's right of recovery. — *Cushman v. Somers*, S. C. Vt., Sept. 24, 1888; 25 Atl. Rep. 515.

27. CONTRACTS— Leases — Implied Covenant. —— A lease of an unfinished building, with a stipulation that it shall be ready at a certain time and a certain room be put in order for the use of the leasee, who was to use the building for the boot and shoe business, does not imply a warranty that the cellar shall not be damp, but should be sufficiently dry for lessee's business. — *Bentley v. Taylor*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 267.

28. CONTRACT— Parol Interpretation. —— By writing A transferred to C his claim against B, which was stated to be so much, but that any mistake as to amount should be corrected, C paying A 65 cents on the dollar; *Held*, that a prior parol agreement, that certain fees due A should be excluded, is not admissible, but the claim may be increased by the amount of such fees. — *Newman v. Blum*, S. C. Tex., June 11, 1388; 9 S. W. Rep. 178.

29. CONTRACT — Rescission. —— Where a turnpike company agreed by parol with plaintiff that he and his family should in consideration of certain land be perpetually entitled to the free use of the turnpike, and after this agreement was made, it was acted upon by both parties for fifteen years: *Held*, that the company could not rescind the agreement.—*Park v. Richmond, etc. Co.*, Ky. Ct. App., Sept. 25, 1888; 9 S. W. Rep. 252.

30. CONTRACT—Specific Performance— Certainty—Evidence.——The expression in an agreement "ten acres of land bought of B and not now in my possession, * * * $500 to be paid when the contract is delivered," is sufficiently certain to authorize proceedings for specific performance and parol evidence may be introduced to identify the land. — *Stout v. Weaver*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 375.

31. CONTRACT— Writing — Parol Addition. —— After the sale of an established business has been made and a memorandum of the contract signed by the parties, a promise by the vendor not to engage in that business in that locality must be supported by a new considera-

tion. — *Carruthers v. McMurray*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 255.

32. COPYRIGHT—Purchaser— Publication. —— Where an author sells the exclusive right to an operatta in America, and the purchasers are in possession of the manuscript before any publication here or in Europe, the author cannot thereafter sell the right to a third person to perform it here, or dedicate it to the public by publication so as to defeat such purchaser's right.— *Goldmark v. Kreling*, U. S. C. C. (Cal.), June 10, 1888; 35 Fed. Rep. 661.

33. CORPORATION— Directors — Individual Liability — Statute.——Construction of Tennessee statute relative to the individual liability of directors for debts of the corporation. Directors are liable under those statutes when the debts of the corporation exceed the capital stock, but not upon such of those debts to the creation of which they have not assented.—*Allison v. Coal, etc. Co.*, S. C. Tenn., Oct. 4, 1888; 9 S. W. Rep. 226.

34. CORPORATIONS—Execution—Officers. —— Though the by-laws of a corporation invest a certain officer with power to make contracts, yet when the contract is made direct with the corporation and registered on its books, any papers executed by such officer relative thereto are *prima facie* unwarranted, so far as they depart from the terms agreed on and registered. — *East R. T. Co. v. Brower*, S. C. Ga., March 3, 1888; 7 S. E. Rep. 273.

35. CORPORATIONS—Insolvency — Store Orders— Liens. ——A store keeper who receives "store orders" from workmen of an insolvent corporation cannot be subrogated to the rights of lien for wages that would otherwise attach for the labor of such workmen. — *Seventh Nat. Bank v. Shenandoah Iron Co.*, U. S. C. C. (W. Va.), Aug. 1, 1887; 35 Fed. Rep. 436.

36. CORPORATIONS—Preference — Insolvency.——Preference by the directors of an insolvent corporation of the near relatives of one of their number is void as against its other creditors.— *Adams v. Kehler Milling Co.*, U. S. C. C. (Mo.), June 15, 1888; 35 Fed. Rep. 435.

37. CORPORATION—Stockholders— Personal Liability— Statute—Estoppel.—— Where by a statute the servant of a corporation is entitled to claim his wages not only from the corporation but if necessary from the stockholders, he is not estopped by taking a note for his wages from the corporation from also pursuing his remedy against individual stockholders. — *Jackson v. Meek*, S. C. Tenn., Oct. 4, 1888; 7 S. W. Rep. 225.

38. COSTS—Criminal Cases—County Liability.——Under Iowa law, a county is liable for the expense of witnesses for the defendant in a criminal case, if the witnesses were ordered to be subpœnaed by the court or magistrate upon a satisfactory showing that their evidence would be material. — *Wheelock v. Madison County*,, S. C. Iowa, Sept. 7, 1888; 39 N. W. Rep. 243.

39. COUNTY—Supervisors—Meetings—Notice— Statute. —— Construction of Iowa statutes relative to the special meetings of county boards of supervisors and the notice of such meetings required by the statute. — *Board of Supervisors v. Horton*, S. C. Iowa, Sept. 10, 1888; 39 N. W. Rep. 394.

40. COURTS — Jurisdiction. —— Construction of Vermont statutes relative to the jurisdiction of courts. When the jurisdiction of the probate court in the matter of claims is exclusive. — *Goff v. Robinson*, S. C. Vt., Sept. 28, 1888; 15 Atl. Rep. 339.

41. CRIMINAL LAW—Accomplice — Corroboration.—— A was the polygamous wife of B, by whom he had had two children. After her return from a trip she again resided on his property, which was near the residence of B's lawful wife, and nothing seemed to have occurred to change their relationship: *Held*, that her testimony as to his adultry with her was sufficiently corroborated, under Utah law. — *U. S. v. Kershaw*, S. C. Utah, Aug. 27, 1888; 19 Pac. Rep. 194.

42. CRIMINAL LAW — Constitutional Power—Remission of Punishment — Statute. —— The statute law of Tennessee which authorizes the remission of part of a term of punishment in a penitentiary on account of good conduct of the convict does not apply to such convicts as were serving their term when the act was passed.—*State v. McClellan*, S. C. Tenn., Sept. 29, 1888; 9 S. W. Rep. 233.

43. CRIMINAL LAW— Continuance — Absent Witnesses. ——Where defendant is indicted for killing his wife, a continuance is properly refused on account of the absence of a witness who could testify that his wife had been unfaithful to him and had made vague and indefinite threats against him. — *Lawrence v. Com.*, Ky. Ct. App., Sept. 13, 1888; 9 S. W. Rep. 165.

44. CRIMINAL LAW—Indictment—Pleading.—— When an indictment contains in several courts several distinct charges of different forms of felony, the court may at any time before the jury is sworn quash the indictment. Rulings on election, failure to indorse witness' name on indictment, juror, jury, custody, sheriff, evidence, argument of counsel, burglary. — *State v. Shores*, S. C. App. W. Va., Sept. 19, 1888; 7 S. E. Rep. 413.

45. CRIMINAL LAW—Insanity— Burden of Proof.——A defendant's admission on the trial of the commission of the crime charged requires a verdict of guilty, unless the evidence shows that there is a reasonable doubt that at the time of its commission he knew what he was doing and knew it was wrong to do it. — *U. S. v. Faulkner*, U. S. D. C. (Tex.), April 28, 1888; 35 Fed. Rep. 730.

46. CRIMINAL LAW—Misnomer—Amendment.——Under the statute law of Wisconsin, a misnomer of a party may be corrected by amendment in criminal case. — *Keehn v. Stein*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 372.

47. CRIMINAL LAW— Perjury — Opinion. —— Perjury may be committed in testifying that one accused of drunkenness was not drunk at the time charged.—*Com. v. Edison*, Ky. Ct. App., Sept. 13, 1888; 9 S. W. Rep. 161.

48. CRIMINAL LAW—Polygamy — Evidence. —— A finding, that there was a plural marriage will not be disturbed where there is evidence tending to show cohabitation with the alleged plural wife, admissions of defendant and his recognition of the marriage relation, and her evidence may be construed into an agreement to be man and wife from the time the cohabitation began.—*U. S. v. Harris*, S. C. Utah, Aug. 27, 1888; 19 Pac. Rep. 197.

49. CRIMINAL LAW—Seduction— Jury. ——Where, in a case of seduction, it appears that defendant by his caresses and flateries acquired an influence over the girl, who was but 15 years old, by means of which he afterwards accomplished his purpose, the question as to whether this amounted to an artifice is for the jury. — *Hawn v. Banghart*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 291.

50. DAMAGES—False Imprisonment— Excessive. —— Where a respectable woman has been imprisoned on a false charge to keep her away while defendant was putting her things out and tearing down the house, $1,000 is not an excessive award damages. — *Clark v. American D. I. Co.*, U. S. C. C. (N. Y.), July 3, 1888; 35 Fed. Rep. 478.

51. DEBT—Presumption — Time of Death — Insurance. —— There is a presumption of law that when a person has not been heard from for seven years he is dead. But there is no presumption as to the precise time within that period of seven years at which the death took place; when that is material it must be established by proof.— *Whitely v. Equitable, etc. Co.*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 369.

52. DEED—Execution—Incapacity. ——Circumstances stated under which it was held that the grantor in a mortgage deed was executed shortly before his death was competent to transact business where he executed the deed, and that the deed was valid. — *Cocke v. Montgomery*, S. C. Iowa, Sept. 10, 1888; 39 N. W. Rep. 386.

53. DEEDS—Land Conveyed— Mines. —— A conveyed lands to B and referred to another instrument for description. The latter described the land by metes and bonds and as mineral entries, and as patented under

certain names: *Held*, that the latter property was also conveyed, though it was not included in the first descriptions.—*Crescent M. Co. v. Wasatch M. Co.*, S. C. Utah, Aug. 27, 1888; 19 Pac. Rep. 198.

54. DISTRICT ATTORNEY—Compensation—Receivers.—Under United States laws it is the duty of a district attorney to act as counsel for the receiver of an insolvent national bank, and he is entitled to the usual compensation thereof to be paid out of the assets of the bank.—*Gibson v. Peters*, U. S. C. C. (Va.), July 2, 1888; 35 Fed. Rep. 721.

55. DOWER — In Guano Island — Protection. —— The act of Congress protecting citizens who discover deposits of guano on the "Guano Islands" does not give title to the land in the discoverer so as to have any dower interest therein entitled to his wife. — *Graffin v. Nerassa Phosphate Co.*, U. S. C C. (Md.), July 5, 1888; 35 Fed. Rep. 474.

56. EASEMENT—Right of Way.——Where an alley between two lots has been used by the tenants of each, and both lots come to be owded by the same person, he may convey the alley-way with one of the lots, and the easement of the tenant of the other in the alley-way will be extinguished. — *Strohmeir v Leahy*, Ky. Ct. App., Sept. 15, 1888; 9 S. W. Rep. 238.

57. EJECTMENT—Possession— Evidence. —— Where, in ejectment, plaintiff relied solely on possession and ouster, of which the evidence was vague, and there is nothing to show definitely the possession by either party of a definite portion of the land, neither having any inclosure, a judgment by the court for the defendant will not be disturbed. — *Garner v. Wright*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 184.

58. ELECTIONS—Canvassing Board— Forgery—Mandamus.——Circumstances stated under which it was held that a *mandamus* was properly refused to compel the canvassing board to canvass the returns of a particular precinct, which returns were forged and fraudulent.—*State v. Kavanaugh*, S. C. Neb., Sept. 26, 1888; 39 N. W. Rep. 431.

59. EMINENT DOMAIN—Constitutional Law — Corporation. —— Circumstances stated under which it was held that a private corporation authorized to inclose a tract of land and to levy taxes on the owners of it to pay for the fence was not empowered to prevent a party whose fence had been used by them from removing the same. — *Hancock, etc. Co. v. Adams*, Ky. Ct. App., Sept. 20, 1888; 9 S. W. Rep. 246.

60. EMINENT DOMAIN — Damages—Fences.—— Under Virginia law, where railroads run through inclosed farms, the companies have not the option of fencing the road bed or suffering the penalty, but an assessment of damages in the report of the commissioners, allowing for the cost of fencing, is proper and binding.—*Norfolk & W. R. R. v. Stephens*, S. C. App. Va., Aug. 16, 1888; 7 S. E. Rep. 251.

61. EQUITY—Hearing in Vacation—Reopening.——A summary hearing before the chancellor in vacation may, in the exercise of his discretion, be reopened for more evidence.—*Caswell v. Bunch*, S. C. Ga., Nov. 29, 1887; 7 S. E. Rep. 270.

62. EQUITY — Mistake — Reforming Instrument.—— Where, by a decree of a court of equity, a mistake in a written instrument is corrected and the instrument reformed, the parties to the contract are bound by its terms as reformed. — *Hale v. Young*, S. C. Neb., Sept. 20. 1888; 39 N. W. Rep. 406.

63. EQUITY — Practice —Receiver—Corporation—Statute.——Statement of the procedure prescribed by the statutes of New Jersey in cases in which a court of equity has appointed a receiver to take charge of the affairs of a corporation. The course to be prescribed by any person against whom a receiver has rendered an adverse decision, he must file a petition to the chancellor according to equity practice—*Moore v. Mercer, etc. Co.*, N. J. Ct. Chan., Sept. 26, 1888; 15 Atl. Rep. 305.

64. ERROR, WRIT OF—Supersedeas Bond—Judgment. ——A *supersedeas* bond, executed before entry of judgment, but delivered afterwards, is valid, but to remove all question plaintiff in error will be allowed to file a bond *nunc pro tunc*—*Chateaugay, etc. Co. v. Blake*, U. S. C. C. (N. Y.), Aug. 2, 1888; 35 Fed. Rep. 804.

65. EVIDENCE—Conclusiveness —Trusts.——It is not sufficient, in a suit to recover dividends from an insolvent bank, that a fund on deposit was in the name of "S, trustee," and might have been derived from the property of S' daughter, of which he had charge, it not being shown that it was so derived.—*Sawles v. Witters*, U. S. C C. (Vt.), July 2, 1888; 35 Fed. Rep. 463.

66. EVIDENCE—Declaration. —— The declaration of a party in interest when relevant to the issue are admissible and competent as tending to prove the defense, and it is error to limit such declarations to merely impeaching testimony.—*Barber's Admr. v. Bennett*, S. C. Vt., Sept. 29, 1888; 15 Atl. Rep. 348.

67. EVIDENCE—Negligence—Opinion.——An old brakeman, who has worked for two weeks on a train operated by a certain engineer, can testify as to the competency and carefulness of the engineer as to all matters which do not involve a technical knowledge of the machinery of an engine.—*Houston, etc. R. Co. v. Patton*, S. C. Tex., June 30, 1888; 9 S. W. Rep. 175.

68. EVIDENCE — Plaintiff's Reputation. —— Where plaintiff testifies for himself, it is error to allow him to state that his character for truth and veracity has never been attacked, and that he boarded with A, who could testify to his good character.——*Savannah, etc. R. Co. v. Harrigan*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 280.

69. EXECUTORS—Demands—Sureties.——A proved a debt against B's estate, but not a debt for which B was surety. Twenty five years after the latter debt was due, the principal having died insolvent, A petitioned that he be made a party to the original creditors' bill against B, the debt not being barred by the statute of limitations, owing to the war and the stay-law: *Held*, that A was entitled to the relief sought.—*Coleman v. Stone*, S. C. App. Va., Sept. 1888; 7 S. E. Rep. 241.

70. EXECUTORS — Widows — Allowance.—— On the death of a resident of Georgia, his widow and minor children are entitled to a year's support out of his estate as against his creditors, though they have never resided here and have lived separate and apart from him.—*Farris v. Battle*, S. C. Ga., Oct. 5, 1887; 7 S. E. Rep. 262.

71. EXECUTOR AND ADMINISTRATOR—Auction Sale.—— Where an administrator has been authorized to sell land at public or private sale, elects to sell at auction, and after the sale and before its consumation is informed that he can get more at private sale, he is only bound for the money he received, provided he believes that he was bound by the public sale.—*In re Worcester's Estate*, S. C. Vt., Sept. 27, 1888; 15 Atl. Rep. 336.

72. EXECUTOR AND ADMINISTRATOR—Claims Against—Presentment—Statute.——Construction of Minnesota statutes relative to the presentment of claims against the estates of decedents.—*Fern v. Leuthold*, S. C. Minn., Sept. 14, 1888; 39 N. W. Rep. 309.

73. FACTORS—Real Estate Agents—Ignorance of Law. ——A, a loan agent, agreed to loan money for B on good security, and brought him a note of C and his wife, representing it to be good, and knowing that C was insolvent but that his wife had land. B accepted the note. A was not paid by B, but by C. The note proved worthless, since the wife's land is not subject to such notes, of which A was ignorant: *Held*, that A was liable to B for the amount loaned.—*Murrah v. Brichta*, S. C. Tex., June 19, 1888; 9 S. W. Rep. 185.

74. FACTORS AND BROKERS—Commissions—Taxation. ——Under the law of Tennessee, a real estate broker or agent cannot recover commissions for his services in making a sale of property, unless he had paid the taxes prescribed by law. It is competent to prove that between the time the agent was employed and the time of the sale the price of such property had greatly enhanced.—*Stevenson v. Ewing*, S. C. Tenn., Sept. 27, 1888; 9 S. W. Rep. 230.

75. FORCIBLE ENTRY AND DETAINER—Verdict—Form—Statute.——Construction of Wisconsin statutes relative to the actions of forcible entry and detainer, ruling as to the form of verdict proper in such cases.—*Dengate v. Stirmell*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 374.

76. FORGERY — Evidence — Variance. —— Circumstances stated under which it was held that an indictment for forgery cannot be sustained, which charges the forgery of the name of the payee on the back of the note, while the only evidence of forgery in the bill of exceptions relates to the name of the drawer on the face of the paper.—*Powell v. Commonwealth*, Ky. Ct. App., Sept. 20, 1888; 9 S. W. Rep. 245.

77. FRAUDS, STATUTE OF—Agreement—Relating to Land. ——A contract that one party should look up and locate lands to be bought by the other party, who should take the title in his own name and pay to the locator one-fourth of the proceeds when the land should be sold, is not within the statute of frauds of Wisconsin. *Watters v. McGugan*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 382.

78. FRAUDS, STATUTE OF — Debt of Another. ——A made a note, which B indorsed. It was made to raise money to reimburse A for losses incurred by him for B, and was so made at B's request, and B promised to pay it when due: *Held*, that in a suit thereon by B against A, such verbal agreement could be shown.—*Schultz v. Noble*, S. C. Cal., Sept. 13, 1888; 19 Pac. Rep. 182.

79. FRAUDULENT CONVEYANCE—Action.——Where a petition charges fully that the conveyance made to the defendant was without consideration and fraudulent, and these charges are not denied in the answer or disproved by the evidence, the conveyance should be set aside.—*Marcum v. Powers*, Ky. Ct. App., Sept. 25, 1888; 9 S. W. Rep. 255.

80. FRAUDULENT CONVEYANCES—Consideration—Declarations.——In a suit to set aside a voluntary conveyance to the grantor's son, and subject the land to the payment of her debts, her declarations, that the land was intended for her son when conveyed to her, and was, therefore, conveyed to her son for a valuable consideration, are not admissible, when the deed to her was on record and expressed a valuable consideration, and the debts were incurred on the faith thereof.—*Jackson v. Lewis*, S. C. S. Car., Sept. 12, 1888; 7 S. E. Rep. 252.

81. FRAUDULENT CONVEYANCES — Mortgages—Equity. ——When a creditor has foreclosed an honest mortgage on personalty, he has no occasion to file a bill in equity to realize the fruits of his foreclosure as against fraudulent mortgages of prior date on the same property which have been foreclosed, and under which the property has been seized and is about to be sold.—*Manheim v. Claflin*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 284.

82. GARNISHMENT — Chattel Mortgage—Lien.——Circumstances stated under which it was held that a creditor, by serving an attachment upon the mortgagee of a chattel mortgage executed by the debtor, acquired a lien upon all the assets included in the chattel mortgage, over and above what was necessary to pay the debt secured by such mortgage.—*Reed v. Fletcher*, S. C. Neb., Sept. 20, 1888; 39 N. W. Rep. 437.

83. HIGHWAY—Defect.——To enable a party to recover for personal injuries suffered by reason of a defect in a highway, it must not only appear that he was himself without fault, but that the defect in the highway was the sole cause of the disaster.—*Phillips v. Ritchie County*, S. C. App. W. Va., Sept. 15, 1888; 7 S. E. Rep. 427.

84. HIGHWAY—Obstruction — Jury.——The question whether rolling barrels of sugar on skids across the sidewalk is a reasonable use of that sidewalk, is a question for the jury.—*Jochem v. Robinson*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 383.

85. HOMESTEAD — Equity—Partition—Jurisdiction.—— In Vermont, the court of chancery has jurisdiction in partition cases involving the homestead, and may, in its discretion, order a sale of part of the land or payment of money by some of the parties if necessary to secure equity and equality.—*Lindsey v. Brewer*, S. C. Vt., Sept. 26, 1888; 15 Atl. Rep. 329.

86. HUSBAND AND WIFE — Abandonment —Gift—Reconveyance.——Circumstances stated under which it was held, that a husband was entitled to a reconveyance of one-half of his homestead which he had given to his wife, who, after the gift, had abandoned him and gone to live in another State.—*Dickerson v. Dickerson*, S. C. Neb., Sept. 25, 1888; 39 N. W. Rep. 429.

87. HUSBAND AND WIFE—Community Property.—— Where community property conveyed to secure the husband's debt, is upon payment thereof conveyed to the wife on a nominal consideration, it again becomes community property.—*Ballew v. Casey*, S. C. Tex., June 19, 1888; 9 S. W. Rep. 189.

88. HUSBAND AND WIFE — Lease — Acknowledgment. ——Under California law, a lease by a married woman passes no estate unless it is acknowledged.—*Carlton v. Williams*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 185.

89. HUSBAND AND WIFE—Separate Estate—Burden of Proof.——Where a husband had coveyed to his wife certain lands in payment of a debt which he alleged to be due to her separate estate it was held, in an action by creditors to subject the land to the payment of her husband's debts, the burden of proof was upon her to show that the conveyance was made upon a valid and sufficient consideration. — *Levi v. Rothschild*, Md. Ct. App., June 14, 1888; 14 Atl. Rep. 535.

90. HUSBAND AND WIFE—Separate Estate —Creditor. ——Where an insolvent husband with his own means improves the real estate of his wife to the extent of $2,000, such real estate is liable to his creditor to that amount.—*Collins v. Slade*, Ky. Ct. App., Sept. 15, 1888; 9 S. W. Rep. 245.

91. INDIANS — Agents — Bond of Evidence. —— In an action on the bond of an Indian agent, a treasury tran script containing a charge "for government property received at the W agency, and not properly accounted for" is too vague to warrant a judgment, and is not aided by a paper attached thereto describing the property by items, such papers not being admissible under act of Congress.—*United States v. Smith*, U. S. C. C. (Mo.), June 4, 1888; 35 Fed. Rep. 490.

92. INJUNCTION — Supreme Court. —— The supreme court, under the South Carolina constitution, can grant a writ of injunction, but cannot dissolve an injunction granted on credit. — *State v. Westmoreland*, S. C. S. Car., Dec. 6, 1887; 7 S. E. Rep. 256.

93. INSOLVENCY—Fraudulent Conveyance—Notice.—— Circumstances stated under which a father receiving from his son notes in payment of his son's indebtedness to him was held to be chargeable with knowledge of the son's insolvency, and the transfer of the notes was held to be fraudulent and void.—*Reed v. Moody*, S. C. Vt., Sept. 29, 1888; 15 Atl. Rep. 345.

94. INSOLVENCY—Preference—Record. ——Under the insolvent laws of Vermont, all transfers of a debtor's property made within four months pevious to his insolvency are void. A chattel mortgage made by a debtor more than four months before his insolvency, but not recorded until ten days previous to that event, is nevertheless valid. — *Gilbert v. Vail*, S. C. Vt., June 25, 1888; 14 Atl. Rep. 542.

95. INSURANCE—Burden of Proof— Action — Trial—Argument. —— In an action on a policy of insurance which stipulated that it should cease and determine if the building fell except as a consequence of fire, defendant admitted that the property was destroyed by fire but alleged that the building had fallen before fire was communicated to the goods: *Held*, that under the statute regulating the burden of proof and the right to open and close the argument defendant had the right to close the argument. — *Royal Ins. Co. v. Schwing*, Ky. Ct. App., Sept, 20, 1888; 9 S. W. Rep. 242.

96. INTOXICATING LIQUORS—Practice —License — Contest— Appeal. —— Construction of Nebraska statutes

relative to licenses to sell intoxicating liquors and the practice and procedure prescribed in cases in which a remonstrance has been filed against the issuance of the license and an appeal taken upon the decision thereof.—*State v. Bonsfield*, S. C. Neb., Sept. 25, 1888; 39 N. W. Rep. 427.

97. INVENTIONS—Base-burning Steam Generator.——Patent 122,360 for base-burning steam generators is not infringed by defendant's device, wherein the coal reservoir extends to, but not into, the furnance or fire-box, there being no water-jacket surrounding the reservoir.—*Catchpole v. Pulsifer*, U. S. C. C. (N. Y.), Aug. 3, 1888; 35 Fed. Rep. 766.

98. INVENTIONS— Chandeliers. —— Patent 205,668 to John A. Evarts for improvement in extension chandeliers anticipates patent of June 13, 1876 to C. H. Carter and J. E. Browne, and is infringed by patent 301,861 to F. A. Chapman and R. A. Wooding. — *Bradley & H. M. Co. v. Charles Parker Co.*, U. S. C. C. (Conn.), July 20, 1888; 35 Fed. Rep. 748.

99. INVENTIONS —Description of Process — Abandonment. —— Description of a process in an application for a patent is not an abandonment thereof to the public, if a patent is applied therefor within two years after the first patent is obtained. —*Eastern P. B. Co. v. Nixon*, U. S. C. C. (Ohio), July 27, 1888; 35 Fed. Rep. 752.

100. INVENTIONS—Design—Patentability—Textiles.—— Design patent No. 16,375, to George Streat for printing textile fabrics, is void for want of novelty and patent ability.—*Streat v. White*, U. S. C. C. (N. Y.), July 2, 1888; 35 Fed. Rep. 426.

101. INVENTIONS—Flying Targets.——Reissued patent 10,122, to the Ligowsky Clay Pigeon Company is not infringed by a target, without a tongue of their metal inserted in a slot in the peripheral rim of a concave target, thrown by means of two lugs on the peripheral rim of a target similarly shaped, clasped and held by a clamp forming part of the throwing arm of the trap.—*Ligowsky C. P. Co. v. Peoria T. Co.*, U. S. C. C. (Ill.), June 30, 1888; 35 Fed. Rep. 755.

102. INVENTIONS—Harrows.—— Patent 178,461, to J. E. Perkinson for an improvement in harrows is infringed by patent issued to J. H. Harris, Oct. 21, 1884.—*Howard v. St. Paul P. W.*, U. S. C. C. (Minn.), Aug. 10, 1888; 35 Fed. Rep. 743.

103. INVENTIONS— Metal Shingles. — Patent 189,115, to Edward Locher and Christian Kinspel, for improvement in sheet-metal shingles, is void. — *National S. M. R. Co. v. Garwood*, U. S. C. C. (N. J.), April 30, 1888; 35 Fed. Rep. 658.

104. INVENTIONS— Target Traps. —— Patent 252,230 to George Ligowsky, patent 313,804, to Jacob Bloom, and patent 302,691, to Benjamin Teipel, for target traps, were not infringed by defendant.—*Ligowsky C. P. Co. v. Peoria T. Co.*, U. S. C. C. (Ill.), June 30, 1888; 35 Fed. Rep. 758.

105. INVENTIONS— Telephone — Cushman Device.—— What was done by Dr. Cushman relative to telephones must be treated as an abandoned experiment. — *American B. T. Co. v. American C. T. Co.*, U. S. C. C. (Ill.), July 21, 1888; 35 Fed. Rep. 734.

106. JUDGMENT—Application—Notice.——A judgment to which a party was entitled and was regular in other respects will not be disturbed for failure to give notice of application for judgment, nor for negligence of the clerk.—*Pormann v. Frede*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 385.

107. JUDGMENT—Default— Clerk in Vacation. ——The Montana law, authorizing clerks in vacation to render judgments by default, is valid. — *Sperling v. Calfee*, S. C. Mont., Sept. 15, 1888; 19 Pac. Rep. 204.

108. JUDGMENT—Erroneous Recitals. —— It is immaterial that a judgment recites that the money recoverable bears interest from an erroneous date, when the party complaining is entitled to the amount of judgment and interest allowed therein.—*Deen v. Blount*, S. C. Tex., June 26, 1888; 9 S. W. Rep. 168.

109. JUDGMENT—Lien—Forthcoming Bond.——Where an execution has been issued on a forthcoming bond and the return is *nulla bona*, equity will regard the bond as a nullity, and the original judgment is in full force.—*Cooper v. Daughtery*, S. C. App. Va., Aug. 1888; 7 S. E. Rep. 387.

110. JUDGE — Disqualification — Appeal. —— Under Iowa law, a judge is disqualified from trying and rendering a judgment in a cause in which he is uncle to the plaintiff, and in such case on appeal the cause will be sent back for a new trial. — *Chase v. Weston*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 246.

111. JUDICIAL SALE—Advance Bid.——After a judicial sale of land has been made and reported to the court, an advance bid may be made of 10 per cent, the bidding being open to all.—*Ewald v. Crockett*, S. C. App, Va., Aug. 16, 1888; 7 S. E. Rep. 386.

112. JURISDICTION — Amount in Controversy. —— Where the petition states that the amout due the plaintiff is a sum in excess of the jurisdiction of the court, but states that the plaintiff seek to recover an amount within such jurisdiction, the court has jurisdiction.—*McVey v. Johnson*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 249.

113. JURY— Criminal Law. —— Where a jury is to be impaneled in a felony case it is not necessary to put the names of those summoned into a box and draw from such box the names of twenty jurors. The law is satisfied if the sheriff selects them.—*State v. Hall*, S. C. App., W. Va., Sept. 19, 1888; 7 S. E. Rep. 422.

114. KILLING-STOCK — Railroads — Statute. —— Code Iowa, § 1,289, about the killing of stock by a railroad does not apply to the killing of a horse being driven by its owner across the track within the limits of the depot grounds.—*Johnson v. Chicago, etc. R. R.*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 242.

115. KILLING-STOCK —Stock at Large.—— Code Iowa, § 1289 does not apply to a team of horses attached to a sleigh and wandering on the prairie at night, driven by a man in a drunken stupor.— *Grove v. Burlington, etc. R. R.*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 248.

116. LANDLORD AND TENANT — Injunction. —— An injunction to prevent a tenant from ploughing up blue grass and planting corn will be dissolved, when the tenant is only required not to injure the land, when the land has often been so used, and it is good husbandy so to enjoy the land.—*Hubble v. Cole*, S. C. App. Va., July 26, 1888; 7 S. E. Rep. 242.

117. LANDLORD AND TENANT—Rent—Sunday.——Where the rent-day fixed by a lease falls on Sunday that day is not counted, and a tender of the rent on the following day is a legal performance.—*Warne v. Wagenor*, N. J. Ct. Chan., Sept. 21, 1888; 15 Atl. Rep. 307.

118. LANDLORD AND TENANT — Tenant at Will. —— Where the landlord by parol leased land for $10 per month, and after the defendant had been in possession several months raised the rent after a stated day to $60 per month: *Held*, that the tenancy was not a tenancy at will, but that the defendant occupying the property after the day fixed was bound to pay rent for the premises at the rate of $60 per month.— *Amsden v. Floyd*, S. C. Vt., Sept. 26, 1888; 15 Atl. Rep. 332.

119. LIBEL — Privileged Communications — Pleadings. ——All charges, allegations and averments, however false and malicious, contained in regular pleadings addressed to and filed in a court of competent jurisdiction, which are pertinent and material to the redress or relief sought, whether legally sufficient to obtain it or not, are absolutely privileged. — *Wilson v. Sullivan*, S. C. Ga., May 23, 1888; 7 S. E. Rep. 274.

120. LIMITATION—Adverse Possession.——Possession cannot be adverse which is taken and held by one person in subordination to the title of another. — *Flynn v. Lee*, S. C. App. Va., Sept. 15, 1888; 7 S. E. Rep. 430.

121. LIMITATIONS—Covenant—Breach.——A covenant of seizin and a right to convey in a deed of realty are broken at the time of the conveyance, if the grantor does not then own the land, and a suit for breach

thereof is barred in ten years therefrom. — *Mitchell v. Kepler*, S. C. Iowa, Sept. 10, 1888; 39 N. W. Rep. 241.

122. LOTTERY — Sale — Rights of Purchaser. —— The legislature having granted a lottery franchise with power of sale, the purchaser may permit others to enjoy part of his profits, but cannot assign the franchise so as to give each assignee the right to conduct a separate lottery.—*Lawrence v. Simmons*, Ky. Ct. App., Sept. 13, 1888; 9 S. W. Rep. 163.

123. MALICIOUS PROSECUTION—Counsel— Advice.—— A defendant in a suit for malicious prosecution cannot shelter himself under advice of counsel, unless all of the material facts were fairly presented to the counsel.—*Cuthbert v. Galloway*, U. S. C. C. (N. Y.), July 9, 1888; 35 Fed. Rep. 466.

124. MANDAMUS—County Treasurer— Predecessor. —— *Mandamus* will not lie to make a county treasurer pay over to a railroad money collected for its use by his predecessor, who transferred it to the county fund, in the absence of proof that he received the money or is presumptively in possession of it. — *Minneapolis, etc. R. R. v. Becket*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 260.

125. MARINE INSURANCE—Notice—Waiver.—— Where full payment of insurance on advance upon a bottomry obligation is refused on the ground that the insurance was *protanto* discharged by the collection of freight, notice of abandonment to the insurers of any claim by the insured against master or owner by reason of such collection is waived. — *Force v. Providence W. I. Co.*, U. S. D. C. (N. Y.), June 4, 1888; 35 Fed. Rep. 767.

126. MARITINE LIENS — Advances — Part Owner. —— Where a steamboat is not partnership property, but her part owners are tenants in common simply, one of them has no lien upon the share of another for advances. —— *The Daniel Kaine*, U. S. D. C. (Pa.), May 29, 1888; 35 Fed. Rep. 785.

127. MARITIME LIENS—Bottomry—Wages—Italian Vessel.——The master of a vessel sailing under an Italian flag has a lien upon the proceeds of the sale of such vessel, made under a bottomry bond, such a lien being allowed by the maritime laws of Italy. — *The Angelia Maria*, U. S. D. C. (S. C.), June 21, 1888; 35 Fed. Rep. 430.

128. MARITIME LIENS—Priority.—— A lien on a vessel for seamen's wages and one of necessary repairs and supplies outrank a subsequent lien for a negligent collision, but will be postponed for laches in enforcing them. — *The Amos D. Carver*, U. S. D. C. (N. Y.), June 23, 1888; 35 Fed. Rep. 665.

129. MARITIME LIENS — Supplies Furnished Cook.—— Where the cook on a tug is paid so much a month and also weekly grub money, on his agreement to board the crew, one who sells him provisions has no lien on the tug, either under maritime or New Jersey law. — *Kretzmer v. The W. A. Levering*, U. S. D. C. (N. J.), June 11, 1888; 35 Fed. Rep. 783.

130. MASTER AND SERVANT—Defective Appliances—Assumption of Risk. —— Where plaintiff undertook to work for defendant and after ascertaining that the machinery and the appliances were imperfect continued to so work: *Held*, that he assumed the risk and could not recover for personal injuries caused by such defective machinery.— *Foster v. Pusey*, S. C. Del., May 25, 1888; 14 Atl. Rep. 545.

131. MASTER AND SERVANT—Negligence— Operating on other Roads.——A railroad, sending its locomotive engineer, employed by the month, with one of its engines to haul temporarily for another company its trains over its own road, is not liable to such engineer for the bad condition of the track or the want of adaptation of the engine to the track.—*Dunlap v. Richmond & D. R. R.*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 283.

132. MASTER AND SERVANT— Negligence of Master.—— A switchman, riding on a flat car, was ordered by the foreman to get down and throw a switch, and he got down on the east side of the car which was more convenient, when he was struck by a switch stand, which was within a foot of the car. He had worked there but eight days, but knew that by order of defendant no building or material was allowed within five feet of the track: *Held*, that the railroad was liable. — *Pidcock v. Union P. R. R.*, S. C. Utah, May 27, 1888; 19 Pac. Rep. 191.

133. MECHANIC'S LIEN—Finding Claim—Time.——When the parties agree that the contract for the erection of a building shall be considered as completed before the finishing touches are put on, the ninety days for filing a lien, under Virginia law, then begin to run.—*Trustees of Church v. Davis*, S. C. App. Va., Aug. 9, 1888; 7 S. E. Rep. 245.

134. MEDICINES—Tax—Taxation.—— Construction of West Virginia statutes regulating the practice of medicine and surgery, and prohibiting the sale of medicines by itinerant dealers or others without paying the prescribed taxes thereon. — *State v. Ragland*, S. C. App. W. Va., Sept. 15, 1888; 7 S. E. Rep. 424.

135. MORTGAGE—Deed Absolute—Evidence. ——Under the evidence it is held, that the deed absolute on its face was not intended to be a mortgage —*Pendergrass v. Burris*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 187.

136. MORTGAGE — Deed Absolute on its Face. —— To convert a deed absolute on its face into a mortgage by parol testimony, such testimony must be clear and specific so as to admit of no doubt.—*Satterfield v. Malone*, U. S. C. C. (Pa.), June 23, 1888; 35 Fed. Rep. 445.

137. MORTGAGE—Deed of Trust—Appointment — Trustee.—— An order appointing a trustee under the statute law of Virginia to execute a deed of trust is invalid, if the proper notice has not been given to the parties interested, or if the motion for such order was made by a party not entitled to make it.—*Pitzer v. Logan*, S. C. App. Va., Aug. 23, 1888; 7 S. E. Rep. 385.

138. MORTGAGE—Foreclosure— Lessee.——Where ice is cut under a lease before foreclosure of a mortgage, which covers the ice-house and the land on which it is situated, the ice does not pass by the foreclosure sale, being the property of the lessee.—*Gregory v. Rosenkrans*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 378.

139. MORTGAGE—Judicial Sale — Lien. —— An injunction was dissolved, and the trustee in a deed of trust was ordered to sell and report to court. It appeared that liens existed against the land: *Held*, it was error to order the sale without first ascertaining the liens against the land. — *Alexander v. Howe*, S. C. App. Va., Aug. 9, 1888; 7 S. E. Rep. 248.

140. MORTGAGES—Notice—Priority.—— While negotiating a loan to A on certain real estate, B learned that the title was in C, and that A was negotiating for its purchase. A gave B a mortgage on the land, which was recorded before C's deed to A and A's mortgage back to C were executed or recorded: *Held*, that B's mortgage must be postponed to C's. — *Montgomery v. Heppel*, S. C. Cal. Feb. 16, 1888; 19 Pac. Rep. 178.

141. MORTGAGE— Priority — Fractions of a Day. —— Where two mortgages are executed on the same day, that which is executed first will have priority over the other, fractions of a day being in such case taken into consideration.—*Wood v. Lordier*, S. C. Ind., Sept. 27, 1888; 18 N. E. Rep. 34.

142. MORTGAGE—Sale—Foreclosure— Redemption. —— Where upon the foreclosure sale under a senior mortgage the junior mortgages not being made parties, the land is purchased in good faith, and the purchaser takes possession making lasting improvements, he cannot be held liable to account to the junior mortgagees for the rental value of the land while in his possession.—*Kigin-botham v. Benson* S. C. Neb. Sep. 20, 1888; 39 N. W. Rep. 418.

143. MUNICIPAL CORPORATION— Water Privileges.—— Where a municipal corporation has by its charter the right to secure a supply of water for public and domestic purposes, the extent to which that right may be exercised depends upon the will of its voters and not upon the cour s.—*Lucia v. Village of Montpelier*, S. C. Vt., Sept. 26, 1888; 15 Atl. Rep. 321.

144. NEGLIGENCE—Burden of Proof—Bailment.——In an action for negligence in the treatment of a horse bailed for hire, the burden of proof to show negligence is up

the plaintiff, and it is not shifted by his showing that the horse was sound when delivered, and injured when returned.—*Malaney v. Taft*, S. C. Vt., Sept. 25, 1888; 15 Alt. Rep. 326.

145. NEGLIGENCE—Contributory Negligence—Infancy.——A child of tender years cannot be held responsible for contributory negligence, but one more mature will be required to exercise such degree of care as might be reasonably expected from one of his years, and in default thereof may be held liable for contributory negligence.—*Twist v. Winona, etc. Co.*, S. C. Minn., Aug. 30, 1888; 39 N. W. Rep. 402.

146. NEGOTIABLE PAPER—Indorsement—Evidence.——An indorsement upon a note, though not in the handwriting of the payor, is some evidence of payment, and may be weighed in determining whether a payment in fact had been made.—*Lawrence v. Graves' Estate*, S. C. Vt., Sept. 29, 1888; 15 Atl. Rep. 342.

147. NEGLIGENCE—Railroads—Fires.—— Where it is alleged that defendant negligently by means of fire from its engine caused the fire which burned plaintiff's hay, it is proper to instruct to find for defendant, the jury must find not only that the engine was properly equipped, but also that the persons in charge were skilful, and that the engine was properly operated.—*Bullisa v. Chicago, etc. R. R.*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 245.

148. NOTICE — Agent — Bona Fide Purchaser. —— A, knowing that B had not paid the purchase price for his land, though his deed admitted payment, acted as agent for B in procuring a loan thereon, and as agent for C, who loaned the money, but C was not aware that A was acting for B: *Held*, that C was not chargeable with A's knowledge.—*Bunton v. Palm*, S. C. Tex., June 19, 1888; 9 S. W. Rep. 182.

149. PARTNERSHIP—References — Fraudulent Conveyance.——A *bona fide* conveyance of individual property by a partner, to secure a debt due his firm, is valid, and a firm creditor, having the partner individually as surety, has no preference over other firm creditors as to such property.—*Indianaoplis, etc. Co. v. Wallace*, S. C. Ind., Sept. 22, 1888; 18 N. E. Rep. 48.

150. PLEADING—Account—Assignment.—— In an action upon account, alleged to have arisen between plaintiff and defendant, the declaration is not amendable by alleging that plaintiff sues as assignee of the account.—*Barron v. Walker*, S. C. Ga., Feb. 3, 1888; 7 S. E. Rep. 272.

151. PLEADING— Averment — Demurrer. —— A complaint, alleging that defendant offered a reward of $500 for the arrest of A, sufficiently alleges that defendant offered to pay it himself, and is good on general demurrer.—*McLeod v. Meade*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 189.

152.—PLEADING—Record— Transcript. —— All pleadings must be made to conform to the requirements of the code; upon appeal the transcript of the record should include everything necessary to the correct understanding of the case.—*Hilton v. Bachman*, S. C. Neb., Sept. 26, 1888; 39 N. W. Rep. 419.

153. POOR AND POOR LAWS—Notice.——One who keeps a pauper that is a transient person, may recover of the town compensation thereof, although he has been notified that the town will not pay.—*Stone v. Town of Glover*, S. C. Vt., Sept. 26, 1888; 15 Atl. Rep. 334.

154. POST-OFFICE DECOY LETTER—Larceny.——A letter with a ficticious address, which therefore cannot be delivered, is not "intended to be conveyed by mail," within the meaning of the act of congress.—*United States v. Denicke*, U. S. C. C. (Ga.), May, 1888; 35 Fed. Rep. 407.

155. PRACTICE—Demurrer to Evidence—Judgment.——If a demurrer to evidence is overruled, judgment should be rendered against the demurrant, without the opportunity of offering any testimony whatever in support of his claim.—*Thiers v. Holmes*, S. C. Tex., June Term, 1888; 9 S. W. Rep. 191.

156. PRACTICE—Dismissal—Record.——Under California law, an action is not dismissed until judgment is entered as required, though the dismissal is properly entered on the record.—*Page v. Page*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 183.

158. PRINCIPAL AND AGENT—Liability—Insurance.——An agent of an insurance company who takes and retains a risk contrary to his principal's order, and a loss having occurred, which the principal had to pay, it was held that the agent was liable therefor.—*Washington F. & M. Ins. Co. v. Cheselro*, U. S. C. C. (Conn.), September Term, 1887; 35 Fed. Rep. 477.

158. PRINCIPAL AND SURETY — Contribution.——Circumstances stated under which it was held that where two parties make a note payable to a third, one of the makers being surety for the other, and the payee guarantees the note and it is discounted at a bank for the benefit of the maker, the surety in the face of the note and the payee as guarantor are not co-sureties, and the former is not entitled to contribution from the latter.—*Stump v. Richardson County Bank*, S. C. Neb., Sept. 25, 1888; 39 N. W. Rep. 433.

159. PUBLIC LAND—Government—Right of Action.——Possession by a homestead claimant, and a receiver's receipt issued since bringing the action, do not divest the government of possession or title so that it cannot maintain action of trespass for cutting timber on the land.—*United States v. Taylor*, U. S. C. C. (Ala.), June 23, 1888; 35 Fed. Rep. 484.

160. PUBLIC LAND—Swamp Lands—Res Adjudicata.——Circumstances stated under which the grantee of swamp lands in the State of Iowa was held not to be concluded by the ruling of the local land office, that the land was not swampy.—*Connors v. Meservey*, S. C. Iowa, Sept. 10, 1888; 39 N. W. Rep. 388.

161. PUBLIC LANDS—Title — Order of Reference.——Under California law, an order of reference by a surveyor-general of a contest for land pending in his office to the district court is sufficient, if it appear therefrom that such contest has arisen, although by clerical error the order does not recite that such reference is made on the demand of one of the parties.—*Espinosa v. Phelan*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 188.

162. RAILROADS— Municipal Aid—Mandamus.——The holders of county bonds issued in aid of railroads are chargable with notice of the provisions of the statutes, under which they were issued, and *mandamus* will not lie to compel a levy of a higher special tax to meet such indebtedness than such statutes permit.—*United States ex rel. v. Macon County*, U. S. C. C. (Mo.), May 28, 1888; 35 Fed. Rep. 483.

163. RAILROAD—Receiver—Leased Line.——The property of a leased line of a railroad in the hands of a receiver is not responsible for any part of the receivership expenses; *per contra*, the receiver must pay the rent of such leased line during his receivership.—*Brown v. Toledo P. & W. R. R.*, U. S. C. C. (Ill.), July 2, 1888; 35 Fed. Rep. 444.

164. RAILROAD BONDS — Coupons — Limitation. —— Where a county issues railroad bonds the coupons thereto attached are subject to the same period of limitation as the bonds, and that time having elapsed from the date of the maturity of the coupons they are barred, although not detached from the bonds.—*Huey v. Macon County*, U. S. C. C. (Mo.), May 28, 1888; 35 Fed. Rep. 481.

165. RAILROAD COMPANIES—Fencing—Depot Ground—Statute. —— Statement of what constitutes "depot grounds," within the meaning of the statute of Wisconsin, which exempts such grounds from the rule that railroads shall be fenced.—*Peters v. Stewart*, S. C. Wis., Sept. 18, 1888; 39 N. W. Rep. 380.

166. REMOVAL OF CAUSES— Time of Motion.——Plaintiff by his summons fixed the first day of the term as the day for defendant's appearance, but failed to indorse it on the complaint as required by Indiana law; under such law the cause could not be called till the second day of the term, though the docketing was according to rule of court, and defendant could move at a subsequent day to transfer the cause to the federal court.—*McKeen v. Ives*, U. S. C. C. (Ind.), July 13, 1888; 35 Fed. Rep. 801.

167. REPLEVIN—Joint Owner — Action.——One who owns a horse jointly with another may maintain an action of replevin for the horse if he is taken from his sole custody.—*Chaffee v. Harrington*, S. C. Vt., Oct. 6. 1888; 15 Atl. Rep. 350.

168. SALE—Bailment.——Circumstances stated under which it was held that a delivery of grain delivered to an elevator could be taken by the proprietor at the highest market price or withdrawn by the owner upon payment of weighage fees was a sale and not a bailment.—*Barnes v. McCrea*, S. C. Iowa, Sept. 10, 1888; 39 N. W. Rep. 392.

169. SALE—Parent and Child—Evidence.——Circumstances stated and evidence detailed under which it was held that certain property claimed by a son belonged really to the estate of his deceased father.—*Perkins v. Greever*, S. C. App. Va., Aug. 16, 1888; 7 S. E. Rep. 391.

170. SALVAGE—Abandonment of Service.——A lighter during a fire was towed from the wharf by two tugs, which left her to attend to other vessels, and the fire was extinguished by other agencies: *Held*, that the services of those tugs were not part of a continuous service culminating in the extinguishing of the fire.—*Ross v. The Angeline Anderson*, U. S. C. C. (N. Y.), July 21, 1888; 35 Fed. Rep. 796.

171. SALVAGE—Fire—Vessel at Dock.——A fire breaking out on a wharf spread to a steamship lying there. Tugs came and towed the ship over to the flats, where she sank, and the fire was extinguished: *Held*, that the tugs were entitled to salvage.—*The Lone Star*, U. S. C. C. (N. Y.), July 21, 1888; 35 Fed. Rep. 793.

172. SEAMEN—Wages—Desertion.——A, a seaman, was absent for several days from his English ship after its arrival here, but returned on the day he was marked as a deserter, and the master was willing to receive him, and as the English law forbids the discharge of a sailor here without the consent of the consul, which was refused: *Held*, that the libel for wages would be dismissed. —*Wilson v. The John Ritson*, U. S. D. C. (S. Car.), June 25, 1888; 35 Fed. Rep. 663.

173. SHIPPING — Bill of Lading — Exceptions. —— A quantity of Brazil nuts were shipped, which were liable to become heated, and the bill of lading excepted liability arising from sweating, heat, steam, etc. On arrival, the nuts were found to be damaged by heat and sweat: *Held*, that the shipper must show negligence on the part of the vessel.—*The Portuense*, U. S. D. C. (N. Y.), June 16, 1888; 35 Fed. Rep. 670.

174. SHIPPING—Bottomry Bond—Cargo Owner.——A bottomry bond was executed on ship A and its cargo, part of which was put on ship B. Ship A was lost, but ship B arrived safely: *Held*, that the owner of ship A was not liable to the owner of the cargo for the amount of the bottomry bond paid by him to redeem the goods on ship B from the lien of the bond.—*Miller v. O'Brien*, U. S. D. C. (N. Y.), June 6, 1888; 35 Fed. Rep. 779.

175. SHIPPING—Damage—Perils of the Sea.——*Held*, that in this case the damage to the cargo was caused by a peril of the sea, and the libel should be dismissed.—*Fowler v. The B. L. Townsend*, U. S. D. C. (N. Y.), July 27, 1888; 35 Fed. Rep. 797.

176. SHIPPING—Passenger — Unguarded Hatch.——A steerage passenger fell through a hatch which was ordinarily kept covered and over which the passengers walked. There was no light and no railing or guard, and no notice was given to the passengers regarding the hatch: *Held*, that the vessel was liable for his injuries.—*Behrens v. The Furnessia*, U. S. D. C. (N. Y.), June 1, 1888; 35 Fed. Rep. 798.

177. SPECIFIC PERFORMANCE—Adequate Consideration. ——A contract for a lease of property worth $1,600 with a rental value of $12 a month, for nine months at $10 a month, with a right of purchase for $1,300, is as to the right of purchase without adequate consideration, under Civil Code Cal., § 3391.—*Morrill v. Everson*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 190.

178. SPECIFIC PERFORMANCE — Mistake.——Circumstances stated under which it was held that in consequence of a mistake in the identity of a house traded for, specific performance of the contract would not be decreed, but that complainant, having made a payment, was entitled to a return of his money.—*Hess v. Evans*, N. J. Ct. Chan., Sept. 19, 1888; 15 Atl. Rep. 310.

179. STATUTES — Enactment — Evidence.——Though the journals of the legislature show a compliance with the constitution in enacting a law, yet the court may inspect prior journal entries to see if the law had not been rejected earlier in the session, making its subsequent passage void, under the constitution.—*Brewer v. Mayor*, S. C. Tenn., Aug. 29, 1888; 9 S. W. Rep. 166.

180. SUBROGATION—Mortgage—Surety.——A creditor has no right to be subrogated to the rights of a surety who has been secured against loss on his suretyship by the wife of his principal who had mortgaged her own estate to indemnify him against liability for her husband.—*Taylor v. Farmers' Bank*, Ky. Ct. App., Sept. 15, 1888; 9 S. W. Rep. 240.

181. TAXATION — Appraisement — Delinquency.——A tax-payer must return an inventory duly verified of his taxable property. If he fails to do so, or if his inventory is not correct, the listers shall appraise his property and double their valuation.—*Bartlett v. Wilson*, S. C. Vt., Sept. 28, 1888; 15 Atl. Rep. 317.

182. TAXATION—Sale Under Execution and Tax Fi. Fa. ——A sale of land under a tax *fi. fa.* and a *fi. fa.* founded on the judgment of a court, is not void, but annexes to the sale as against both *fi. fas.* the statutory incident of redemption.—*Clower v. Flemming*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 278.

183. TAXATION—Tax-deed—Notice of Redemption.—— A tax-deed executed without service of the notice of the expiration of the redemption upon the tenant in possession of the land, is invalid, under Iowa law, though the notice was served on the person in whose name the land was taxed.—*Bradley v. Brown*, S. C. Iowa, Sept. 8, 1888; 39 N. W. Rep. 258.

184. TOWAGE — Negligence.——Under the evidence, held that the grounding of libelant's boat was not caused by negligence of the tug, and the libel should be dismissed.—*Carpenter v. The Clinton*, U. S. D. C. (N. Y.), May 12, 1888; 35 Fed. Rep. 672.

185. TRESPASS—Pleading.——A declaration, in an action upon land, charging that defendant cut and took away all the timber, oak, poplar, pine, walnut, etc., enumerating them to the value of $3,000, sufficiently states a cause of action.—*Newlon v. Reitz*, S. C. App. W. Va., Sept. 15, 1888; 7 S. E. Rep. 411.

186. TRESPASS TO TRY TITLE—Evidence—Relevancy.— In a second suit of trespass to try title, defendant cannot offer in evidence certain plats, used by plaintiff on the former trial to establish his boundaries, to show inconsistency in plaintiff's evidence, since plaintiff was not bound by evidence offered by him on the former trial.—*Jones v. Andrews*, S. C. Tex., June 26, 1888; 9 S. W. Rep. 170.

187. TRUSTS—Resulting—Purchase Money.——A purchased land for $200 cash and a note for $700, secured on the land. B advanced the money and the deed was made in his name to secure him, he verbally agreeing to reconvey as soon as he was protected: *Held*, that B held the property in trust for A.—*Thomas v. Jameson*, S. C. Cal., Sept. 22, 1888; 19 Pac. Rep. 177.

188. USURY — Agent's Commissions. —— When the lender neither takes nor contracts to take anything beyond lawful interest the loan is not made usurious by what the borrower does in procuring the loan or using its proceeds, such as paying an intermediary for his services.—*Merck v. American, etc. Co.*, S. C. Ga., Dec. 7, 1887; 7 S. E. Rep. 265.

189. USURY — Mortgage. —— Under Georgia law, a mortgage made to secure a debt infected with usury is not void.—*Hodge v. Brown*, S. C. Ga., July 11, 1888; 7 S. E. Rep. 282.

190. VENDOR AND VENDEE—Bonds—Purchase—Appeal. ——A purchaser who buys bonds that are in litigation

of which he has notice, and an appeal taken in the case without a *supersedeas*, takes such bonds subject to the determination of the course on appeal.—*Phelps v. Elliott*, U. S. C. C. (N. Y.), July 10, 1888; 35 Fed. Rep. 455.

191. VENDOR AND VENDEE—Defect in Quantity—Price.——Where a lot of land is sold by number, and one of the boundaries is misrepresented so that the purchaser gets only a part of the land represented, the deduction in price is in the proportion which the value of the land lost bears to the tract intended.—*Smith v. Kirkpatrick*, S. C. Ga., Nov. 10, 1887; 7 S. E. Rep. 258.

192. VENDOR AND VENDEE—Lien—Assignment.——The lien of a note for unpaid purchase money of land is not lost by the assignment of the note to a third person as collateral security for a debt.—*Cate v. Cate*, S. C. Tenn., Sept. 27, 1888; 9 S. W. Rep. 231.

193. WARRANTY—Breach.——Where, in a case of ejectment, it appears that there has been a breach of warranty by the defendant, the judgment for such breach should be affirmed.—*Ackerman v. Huff*, S. C. Tex., June 30, 1888; 9 S. W. Rep. 236.

194. WILL—Condition—Remainder.——Where a testator, by his will, devised his estate to be equally divided among his four sisters for life with remainders to their children: *Held*, that the children of such of his sisters as died took the share of their mother, and that the share of one of the sisters who died without leaving issue should be divided *per stirpes* among the descendants of the other sisters.—*Shepard's Heirs v. Shepard's Estate*, S. C. Vt., June 13, 1888; 14 Atl. Rep. 536.

195. WILL—Construction—Fee-simple—Estate.——Terms of a will stated and set forth by which it was held, that an estate in fee-simple passed to the devisee, the widow of the testator, although there were no words of inheritance used in the will, and this because no intention to limit such an estate was either expressed or implied in the will.—*Robbins, etc. Co. v. Robbins*, Ky. Ct. App., June 7, 1888; 9 S. W. Rep. 254.

196. WILL—Construction—Life Estate.——Terms of a will set forth under which it was held that the widow of testator took a life estate in all the residuum of all the testator's property, and that her interest was assignable, the remainder, after her death, being disposed of by the terms of the will.—*Peck v. Smith*, S. C. R. I., July 7, 1888; 15 Atl. Rep. 312.

197. WILLS—Construction—Without Issue.——A testator left a portion of his estate to trustees for the benefit of the children of his deceased son, B. He provided that if any of them should die, B's children leaving no children of their body, the survivors to be the proper heirs, and in case all should so die, then to his other grandchildren: *Held*, that the words "if any of them should die," mean during the life of the testator or before destitution, and that B's children on attaining majority are entitled to their shares from the trustee.—*Trabue v. Terry*, Ky. Ct. App., Sept. 13, 1888; 9 S. W. Rep. 161.

198. WILLS—Executory Devisees—Waste.——A mother devised land to a trustee for her son, and if the son should die without children the trustee should sell and place the proceeds in the hands of another trustee for the benefit of her other children: *Held*, that neither the son's children nor his brothers or sisters can interfere to prevent him from committing waste.—*Matthews v. Hudson*, S. C. Ga., July 12, 1888; 7 S. E. Rep. 286.

199. WITNESS—Privilege—Trade Secrets.——Where a witness on direct examination testifies only as to uses and effects of "Moxie," he cannot be required, on cross-examination, to disclose the particular ingredients of that preparation, it being a trade secret.—*Moxie, etc. Co. v. Beach*, U. S. C. C. (Mass.), July 2, 1888; 35 Fed. Rep. 465.

200. WRITS—Service—Impeachment.——In an action to set aside a judgment, plaintiff and four others testified that she was not at the place where the officer returned that he had served her, but their testimony was based solely on their recollection, and the service occurred over three years before, the officer showed that he received the writ that day. Plaintiff and her husband were contradicted as to incidental facts: *Held*, that the evidence was not sufficient to establish the falsity of the return.—*Wyland v. Frost*, S. C. Iowa, Sept. 10, 1888; 39 N. W. Rep. 241.

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## RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF CONDITIONAL SALES OF PERSONAL PROPERTY. By Charles R. Miller, Canton, Ohio. Cincinnati: Robert Clarke & Co. 1888.

We have now before us a little work (of one-hundred and ninety-six pages) on a subject of an intensely practical character. Conditional sales have of late years come much more frequently before the courts than in former times, and the law on the subject has been developed by new applications of old and well-known principles. Mr. Miller has done well in presenting to the profession a work which, we think, is much needed, and which will be found very useful by practitioners. He has in some respects adopted a new plan in the arrangement of his material, which he explains thus in the preface: "It has been my object, in producing this work, to present a comparitively modern branch of the law in a new way: that of bringing together, for more ready reference, cases similar in point of law and fact." The work is brought out in good style by the enterprising publishers, and we heartily commend it to the profession.